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STATUTE LAWS RELATING TO VESSELS.

THE laws relating to the registry of vessels, the transfer of vessels by bill of sale, the enrolling and licensing of vessels for the coasting trade and fisheries, and the bounties payable to vessels employed in the cod-fishery, are of immense importance to those engaged in mercantile pursuits, but they are to be found only by an examination of the numerous statute laws of the United States, or in the voluminous digests of the same. The following summary of these laws has been prepared with care, and will, we believe, prove useful to those to whom the statute regulations are peculiarly applicable, especially to those members of the profession more particularly engaged in mercantile law; and the suggestions made in relation to some alterations of the laws may, we venture to hope, receive attention from those whose duty it is to legislate on this subject.

REGISTERED VESSELS.

Vessels built in the United States, and wholly owned by citizens thereof; vessels captured in war by such citizens, and condemned as prize; vessels adjudged to be forfeited for breach of the laws of the United States, being wholly owned by such citizens; and no others, may be registered. No vessel is entitled to registry, or if registered, to the benefits thereof, if owned in whole, or in part, by any citizen usually residing in a foreign country, during such residence, unless he be a consul of the United States, or an agent for, and a partner in, some house of trade or copartnership, consisting of citizens of, and actually carrying on trade within, the United States.[1]

A registered vessel which by sale becomes the property of a foreigner, shall not be entitled to a new register, notwithstanding she may afterwards become American property.[2] No vessel is entitled to registry, or its benefits, owned by a non-resident naturalized citizen, if residing for more than one year in the country from which he origi-

[1] Act of Dec. 31, 1792, sec. 2.

[2] Act of June 27, 1797; March 27, 1804.

nated, or for more than two years in any foreign country, unless he be a consul, or other public agent of the United States.[1]

A vessel shall be deemed to belong to the port at or near which the managing owner usually resides; and the name of the vessel, and of the place to which she belongs shall be painted on her stern, on a black ground, with white letters of not less than three inches in length.[2] The certificate of the master carpenter, under whose direction the vessel is built, must be produced, prior to registry; which certificate is sufficient to remove a new vessel from one district to another in the same or an adjoining state, where the owner actually resides, provided it be with ballast only.[3]

In order to the registry of a vessel, the owner, or one of the owners, must make oath to the property of the vessel, her name, burthen, time when, and place where, she was built; and that there is no foreigner interested, directly or indirectly, in such vessel, or in the profits thereof; and that the master is a citizen of the United States. The oath required to be taken by the owner, respects only the legal ownership of the property; and does not require a disclosure of any equitable interests vested in citizens of the United States, but only a denial that any subject or citizen of any foreign prince or state is directly or indirectly interested in the ship, or in the profits thereof. An agent or attorney may make oath, as agent, in case of registry, where the owner is fifty miles distant from the district to which, by virtue of purchase, the vessel should belong.[4]

Steamboats may be registered or licensed in the name of the president or secretary of an incorporated company, without designating the names of the persons composing the company; but no part of such vessel can be owned by any foreigner.[5] Vessels employed wholly in the whale fishery, owned by an incorporated company, may be registered as above, so long as they shall be wholly employed therein.[6]

The issuing of certificates of record applies only to such vessels as are entitled to them by the 20th section of the act of Dec. 31, 1792; that is to say, to vessels built either by or for foreigners in the United States, and does not extend to vessels, which, having been registered, are sold to a foreigner.

Any vessel entitled to registry, being in a port other than the one to which the owner usually resides, may be registered at the place where she may be at the time. And the oath required may be taken before the collector of the place to which the vessel belongs, or before the collector of the place in which she may be. When such vessel shall arrive within the district to which she belongs, the register so obtained shall be delivered up to be cancelled, and a permanent register granted in lieu thereof.

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[1] Act of March 27, 1804, sec. 1.
[2] Act of 1789, ch. 2.
[3] Act of Dec. 31, 1792, sec. 8.
[4] Ibid, sec. 3, 4.
[5] Act of March 3, 1825, sec. 4, 5.
[6] Act of March 3, 1831.
[7] Act of Dec. 31, 1792, sec. 11, 12.

When a registered vessel is transferred to a foreigner, such transfer shall be made known by delivering up to a collector of a district, the certificate of registry, within seven days after such transfer of property; and if the transfer shall take place when the vessel is at a foreign port, or at sea, the master of the vessel shall within eight days after his arrival in any port of the United States, deliver up the register to the collector of such district.[1] It is the practice not to destroy the register after it is cancelled; it is deposited in the register's office, and a duly certified copy is legal evidence.

If the master of a registered vessel be changed, the name of the new master is endorsed upon the register, upon his making oath that he is a citizen of the United States. If any certificate of registry or record shall be fraudulently or knowingly used, for any vessel not then actually entitled to the benefits thereof, she, with her tackle, &c. shall be forfeited to the United States.[2] An enrolled or licensed vessel about to proceed on a foreign voyage, must surrender her enrolment and license, and be duly registered, or she, together with the goods imported therein, will be liable to seizure and forfeiture.[3] In case of the loss of a register, the master of the vessel may make oath to the fact, and obtain a new one.

OF THE TRANSFER OF VESSELS.

When any registered vessel shall, in whole or in part, be transferred to a citizen, or altered in form or burthen, by being lengthened or built upon, or from one denomination to another by the mode of rigging, she shall be registered anew, or cease to be deemed a vessel of the United States. And in every such case of transfer, there shall be some instrument in the nature of a bill of sale, which shall recite at length such certificate, otherwise such vessel shall not be so registered anew. And if a vessel shall not be so registered, she shall not be entitled to the privileges of a vessel of the United States.[4]

If a registered vessel be sold in part to resident citizens of the United States, while at sea, without a bill of sale reciting the register, and without being then registered anew, she is not liable with her cargo for higher duties than are payable by vessels of the United States. The registry acts have not changed the common law mode in which ships may be transferred; but only take from any ship not transferred according to those acts, the character of an American ship, and deem them alien or foreign ships. By the general maritime law, a bill of sale is necessary to pass the title of a ship. The inaccurate recital of the certificate of registry in the bill of sale, does not avoid the sale, but the vessel is thereby deprived of her American privileges. If a sea vessel be assigned to a foreigner, the effect is the same; but if it be a coaster, the sale is not thereby invalidated, but the vessel is subject to forfeiture. A regular bill of sale of a vessel at sea, will trans-

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[1] Act of Dec. 31, 1792, sec. 16.
[2] Ibid, sec. 15, 27.
[3] Act of Feb. 18, 1793, sec. 8.
[4] Act of Dec. 31, 1792, sec. 14.

fer the property. And, in general, where there can be no manual delivery, there should be a delivery of something as an *indicium* or token. A bill of sale is the proper title to which the maritime courts look, it is the universal instrument of transfer of vessels; it is made absolutely necessary by statute.[1]

ENROLLED VESSELS.

Enrolled vessels are those over twenty tons burthen, employed in the coasting trade and fisheries; and are licensed annually for the employment or business authorised by the tenor of the license. Vessels enrolled and licensed, bound on a foreign voyage, may be registered; and enrolled vessels, being in a port other than the one to which she belongs, on the expiration of the license, may obtain temporary registry. Vessels under twenty tons burthen may be licensed for the coasting trade or fisheries. A vessel licensed for any employment, may surrender it at any time within the period for which it was issued. When the master of an enrolled vessel is changed, an endorsement must be made of the new appointment, or the vessel will be liable for the payment of the fees of a registered vessel.

All licenses must be renewed within three days after the expiration thereof, if the vessel be within the district to which she belongs; if on a voyage at the time of expiration, within three days after her first arrival; if sold, in whole, or in part, the license is vacated. Should a license be lost or destroyed, a new one may be obtained, on the oath of the master to the loss, &c. On a transfer of an enrolled vessel, a new enrolment must be obtained, the requisites for obtaining which are similar to those for registered vessels.

COASTING TRADE.

The United States is divided into three great districts; the *first*, between the eastern limits of the United States and the southern limits of Georgia; the *second*, to include all districts, &c. between the river Perdido and the western limits of the United States; and the *third*, all the ports, &c. between the southern limits of Georgia and the river Perdido.[2]

Every vessel destined from a district in one state to a district in the same, or an adjoining state, with foreign merchandise in packages as imported, the value of which exceeds four hundred dollars, or with foreign goods in original packages or otherwise, the aggregate value of which exceeds eight hundred dollars, must obtain a clearance. On the arrival of every such vessel at the port of destination, the master must enter the vessel and obtain a permit to unlade his cargo.

Vessels sailing with a coasting license, laden with goods wholly of the produce or manufacture of the United States, are not required to clear,

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[1] 4 Dall. 374; 4 Cranch, 48; 1 Mason, 306; 1 Wash. C. C. R. 226; 1 Robinson, 122.

[2] Act of 1819, ch. 172; May 7, 1822, sec. 11.

if bound from one to another port within either of the three great districts.

All registered vessels engaged in the coasting trade, are required to clear in going from one district to any other district, and also upon her arrival in the other district, to enter, under similar regulations to those vessels under a license.

VESSELS ENGAGED IN THE FISHERIES.

The cod fishery and mackerel fishery are each a trade or employment, within the true intent and meaning of the act of 1793, sec. 32. Since the act of 1828, ch. 109, the mackerel fishery cannot be lawfully carried on under a license for the cod fishery.

The 32d section of the act of February 18, 1793, forfeits a vessel licensed for the fisheries, if engaged in a business, of whatever nature, and with whatever object, which is not expressly authorised by the tenor of the license. But vessels licensed for the mackerel fishery are not liable to the forfeiture imposed by the 5th and 32d sec., of the act of February 18, 1793, in consequence of any such vessel whilst so licensed having been engaged in catching cod or other fish. But the owner of such vessel may not receive the bounty allowed to vessels in the cod-fishery.[1] A vessel to be entitled to the bounty must be actually employed, at sea, in the cod fisheries, a certain specified time, and must *dry cure* the fish caught.[2]

The fishing season is accounted from the last day of February to the last day of November; and the following allowances are paid on the last day of December, annually, to the owner or his agent, of each vessel that shall be duly licensed and qualified for the cod fisheries, and that shall have been employed four months of the fishing season, viz:—To every vessel of more than five tons and not exceeding 30 tons burthen, $3.50 per ton; above 30 tons burthen $4 per ton; above 30 tons, with a crew of not less than 10 persons and employed three and a half months, $3.50 per ton. The bounty on any one vessel cannot exceed $360. Vessels of more than 5 and less than 20 tons, must catch and land 12 quintals of fish per ton, during the season.[3]

The skipper of each fishing vessel, must make an agreement with every fisherman before proceeding on a voyage.[4] By paying monthly wages in money in lieu of dividing the fish, or the proceeds of the fishing voyage, in the proportions provided for by law, the agreement is violated, and the bounty is forfeited. The oath of the master, of the time the vessel has been actually employed in the fisheries, is required by an act of July 29, 1813, sec. 6.

Fishing vessels wrecked may obtain the bounty, in certain cases, by the act of 1824, ch. 152. Fishing vessels may obtain a license to touch and trade at a foreign port, under the act of February 18, 1793.

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[1] Act of April 20, 1836.

[2] Act of July 29, 1813.

[3] Act of July 29, 1813; and March 3, 1819.

[4] Act of 1813, ch. 2.

But the mere proceeding to a foreign port, if within the customary range of a fishing voyage, is not proceeding on a foreign voyage, within the meaning of the act. Vessels licensed to touch and trade at a foreign port, must report and enter, on arrival, under similar regulations to those of registered vessels engaged in foreign trade. The bounties granted by law, are paid on such vessels only, the officers and three fourths of the crew of which, shall be proved citizens of the United States.[1]

The laws relating to the enrolling and licensing of vessels, as well as those relating to the registering and recording of them, require, that when a vessel is sold and transferred, in whole, or in part, her papers shall be given up to be cancelled, and that she shall be papered anew: that when a vessel employed in the coasting trade, cod fishery, or mackerel fishery, is at a port other than the one to which she belongs, whose license has expired, she is required to surrender the enrolment and license, and obtain a "temporary register," to enable the vessel to return to the port of ownership, even should that port be in an adjoining district, there again to be enrolled and licensed, in every particular as before the temporary register was granted: and when an enrolled vessel is at a port other than the one to which she belongs, and is destined for a foreign port, she is required to surrender all her papers, and procure a register, for the foreign voyage; and upon her return to the port where she is owned, she is again subject to the requirements of the enrolment and license acts. This series of changes may be entirely obviated, and the whole business of registering, recording, and licensing vessels arranged, in a simple and concise manner, by the enactment of a law authorising *all* vesssels to be registered *permanently*, whether engaged in foreign trade, coasting, or fisheries, according to the form now in use for vessels bound on a foreign voyage. The several parts or proportions owned by each individual, ought also to be expressed in the register; and when a *partial* transfer of property is made, it should be endorsed on the register and the record; and when there is an hypothecation, by bottomry or otherwise, it should be recorded, to be valid; and thus make the register the real evidence of ownership. According to the present system, volumes of records are required to be kept, at great labor and expense, in consequence of the frequent partial changes of property in vessels, and their changes of employment.

After a vessel is permanently registered, and is to be employed in the coasting trade or fisheries, a license should be given for that particular employment, to be renewed annually; and when a vessel is taken from either of those employments, to be put into foreign trade, the license should be surrendered, and a clearance granted to proceed on the voyage, under the *original permanent document*.

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[1] Act of March, 1817, sec. 3.

Copies of all registers and enrolments issued by the existing laws, must be transmitted to the register of the treasury, and a duplicate of each made for the records of the custom-house. Consequently, when a vessel is registered, enrolled, and licensed, and again registered, as often happens within a year, triplicate copies at each change are rendered necessary. By the mode suggested, the labor at the custom-houses would be greatly reduced; the records would at all times show the real, *bona fide* ownership of vessels; and the mercantile community would be relieved of the onerous requirements imposed by every partial transfer of their property in vessels, and also those incident to their frequent changes of employment.

When the laws were in force imposing duties on tonnage of vessels from foreign ports, and on vessels going from district to district, under a register, and on the renewal of every license, the present system was necessary, to collect the revenue thus accruing; but the act of May 31, 1830, repeals the tonnage duties on all American vessels, of which the officers and two thirds of the crew are citizens of the United States; therefore, the registering and licensing acts so complicated and burthensome in their requirements, should be altered or amended, to meet the present exigencies of commerce. The acts upon which the existing system is based, are those of Dec. 31, 1792; Feb. 18, 1793; March 2, June 27, 1797; March 2, 1803; March 27, 1804; March 3, 1825; and Feb. 11, 1830.

In a future article I may continue this subject in its connexion with the hypothecation of vessels; loans on bottomry; mortgages, &c.

Custom House, Boston, January, 1841. W. A. W.

RECENT AMERICAN DECISIONS.

Supreme Court of Pennsylvania, September Term, 1840.

GREGG v. BLACKMORE AND OTHERS.

A party who has positively disclaimed both title and possession for a period sufficient to give effect to the statute of limitations, is estopped from denying that the possession of the opposite party has been actual and adverse.

AT the trial of this action of ejectment in the district court of Alleghany, the case was thus: Jane Ormsby, from whom both parties derive title, died seized in 1793, leaving a husband, John, and issue, Joseph, Oliver, Sidney the plaintiff, and Mary, the daughter of a deceased son. Joseph devised his part to the plaintiff's son, who is since dead, without issue. The original tract consisted of sixtytwo acres, on the Monongehela, near Birmingham, and contains a very valuable coal mine. Soon after the mother's death, the plaintiff, with

her husband, entered on the upper end of it, cleared a portion of it, and erected a ferry house on it. Two years afterwards, her father made a deed of gift to her, first of twentyfive acres, and afterwards of eight acres, making in all thirtythree acres, or a little more than a moiety of the whole. From ignorance either of the scrivener or of the parties, the deed purported to convey the fee, though the father had no more than an estate by the curtesy ; and the part conveyed was set off by a fence which divided it from the rest. The plaintiff having thus acquired her father's interest in a moiety, while she and her son were entitled to the fee simple of two fourths of it, continued to keep exclusive possession of it, clearing, improving, and building on it, without objection by her brother or her neice ; and having acquired an indefeasible title to it by the statute of limitations, she instituted this action as a tenant in common, to recover her original share of the residue, as well as the share of her deceased son, to whose estate she succeed by the intestate laws. Oliver, her brother, from whom the defendants derive their title, entered on the residue, at the death of the father, and inclosed it, but a flood soon afterwards swept away the fences. A house built on it, was not always inhabited, and a part of the ground had been an open common. On these facts, Mr President Grier directed the jury that the defendants were protected by the statute of limitations ; and the verdict was in their favor.

The cause was removed by writ of error to this court ; and the question was argued by

M'Candless and *Forward* for the plaintiff, and by

Shaler for the defendants.

Gibson C. J. delivered the opinion of the court. The plaintiff, being entitled on the part of her mother, to the fourth part of a tract of land which had descended to her in common with a brother, the daughter of a deceased brother, and her own son as devisee of another brother ; entered with her husband into a part of it, and shortly afterwards received from her father who was tenant by the curtesy, a conveyance of a moiety of it in fee, which was parted from the rest by a boundary fence, to which she and her husband cleared, cultivated, and had actual possession, while her brother exercised acts of ownership over, the residue but did not always keep it inclosed or in actual occupancy. Having acquired an indisputable title to a moiety by the statute of limitations, she ungraciously claims her original interest in the residue as a tenant in common.

Had she and her brother each owned a moiety instead of a fourth, the parting of her property by her husband's act, with the brother's assent, and her subsequent ratification, when she had become discovert, might possibly have constituted a parol partition, executed in part, and therefore binding the rights of both. But her son owned a fourth, while a neice owned another fourth ; and these could not be concluded by a transaction, even had it not been in their infancy, to which

they were not privy : consequently, as they were not bound by the partition, neither were the parties to it bound by it. Still was there not such a separation of the occupancy under reciprocal claims of exclusive right to the particular parts, as made the possession of them respectively adverse ?

The circumstances of the case are unusual, but they exhibit a very distinct abandonment of the original joint possession, and an assumption of separate possession of a moiety by each, with a relinquishment of pretension to any thing else ; and that such an abandonment is equivalent to an ouster, which, as said by Lord Mansfield in *Fishar v. Prosser*, (Cowp. 218,) may be constituted by less than forcible expulsion, was ruled in *Mehaffy v. Dobbs*, (9 Watts, 377,) and also in *Royer v. Benlow*, (10 Serg. & R. 306,) in which Chief Justice Tilghman stated the law to be, that wherever the person who has the right, *confesses* himself to be out of possession, the act of limitations runs against him, because there is sufficient evidence of his being ousted though the land be not enclosed by his adversary ; and that he may admit himself to be out of possession as well by his conduct as by his declaration : for instance by suffering one in possession of the part to pay the taxes for the whole. This, indeed, was said of actual possession of a part, extended by construction to the whole ; and in *Seeber v. Willing*, (10 Watts ——,) it was ruled, that a confession of ouster is not to be *implied* from payment of taxes without such partial occupancy ; but surely an *express* confession of it, or of what is equivalent —seisin or separate possession by another in his own right—is sufficient evidence of the fact to found a title by the statute of limitations, even without partial occupancy or positive acts of ownership. Having suffered him to repose on such a confession during the period material to the question, and having induced him to forego the actual possession, it would be a fraud on the statute to throw him back on his original title, perhaps when the muniments of it were lost, or his witnesses had passed away. In the case at bar, not only was the brother suffered to pay the taxes assessed on his moiety, but all pretension to the possession of it, was disclaimed by acts which admit not of qualification. The plaintiff held by the boundaries designated in her father's conveyance—she had receded from everything else—and why that was framed with an apparent intent to pass a fee, it were needless to inquire. The business is to ascertain the extent of her occupancy under it, for its conformity to those boundaries would have had the same effect, had the grantor been destitute of pretence to an estate in the premises. But he had a freehold ; and his conveyance, though too large for the subject of it, might, were it material, be referred to the estate that was in him. Erroneously supposing him to have had the fee, she thought herself, and her brother doubtless thought her too, entitled to a moiety in severalty as an advancement by the father ; and entering under that belief, it is clear that she left the residue of the tract to her father and those who were to succeed him. But even if she had entered as a tenant in common by descent

from her mother, the possession of a moiety gained by an invalid partition, acquiesced in by the brother, as it would in time give her an indefeasible title against him by the statute of limitations, would be a relinquishment of the possession as to the residue; and she must consequently be held to have occupied according to what she supposed to be her title. But the necessity of an inquiry as to that, is superseded by the fact that she proclaimed the limits of her occupancy by an actual, visible, and palpable enclosure, beyond which she disclaimed every prerogative of ownership; and if acquiescence in perception of profits by a co-tenant be an acknowledgement of exclusive possession by him, how much more may an amicable division and allotment be so? It is on this principle that the statute operates in the case of a boundary mistakingly acquiesced in by the party subsequently concluded by it.

This decision of the question of adverse possesion, would supersede a decision of the points raised on the doctrine of advancement, did they necessarily spring from the evidence. But there was no pretence of advancement by the mother; and an advancement by the father could not be taken into the account. If the points were relevant, it would be enough to say we perceive no error in the direction given in respect to them; and the doctrine is, beside, fully considered in an action at the present term between other branches of the same family.

Judgment affirmed.

Circuit Court of the United States, Maine, May Term, 1838, at Portland.

WEBB v. THE PORTLAND MANUFACTURING COMPANY.

Actual perceptible damage is not indispensable as the foundation of an action. It is sufficient to shew a violation of a right. The law will presume some damage in such a case. *A fortiori*, where the act done is such, that, by its repetition or continuance, it may become the foundation or evidence of an adverse right.

A party may recover at law nominal damages for a diversion of a water-course, where no actual damage has occurred, as a means of establishing and protecting his right. *A fortiori*, he may assert his right in equity, by a writ of injunction.

No riparian proprietor or mill-owner has a right to divert or unreasonably retard the natural flow of water to the parties below; and no proprietor or mill owner below has a right to retard or throw it back upon the lands or mills above, to the prejudice of the right of the proprietors thereof.

Where there is a mere fugitive and temporary diversion of water, without damage, and without pretence of right, a court of equity will not interfere, by way of injunction. *Qære*, whether there would be any redress at law.

The plaintiffs and defendants were owners of different mills, in severalty, on the same mill-dam. The defendants opened a canal into the pond, at some distance above the dam, for a supply of water to work one of their mills the water thus wit..drawn being returned into the river immediately below the dam. *Held*, that both parties were

entitled *per my et per tout*, to their proportions of the whole stream, on its arrival at the dam, and that neither party could divert any portion of it, though the portion diverted were a less quantity than he would naturally use at his mill on the dam. It will be no answer to such a violation of right by one party, that the other has increased the quantity of water in the stream by means of a resevoir higher up.

BILL in equity for an injunction by the plaintiff to prevent the defendant from diverting a water-course from the plaintiff's mill and for further relief.

The facts admitted on all sides were, that at the Saccarappi Falls, on the river Presumpscutt, there are two successive falls, upon which there are erected certain mills and mill dams, the latter being called the upper and the lower mill-dams, and the distance between them is about forty or fifty rods; and the water therein constituted the mill pond of the lower dam. The plaintiff is the owner of certain mills and mill privileges, in severalty, upon the lower dam, and the defendants are entitled to certain other mills and mill privileges on the same dam, also in severalty. As to a portion of one of the mills, there was a controversy between the parties in regard to title; but that controversy in no essential degree affected the question presented to the court. The defendants are the owners of a cotton factory mill near the left bank of the river, and opened a canal for the supply of the water necessary to work that mill, into the pond immediately below the upper dam; and the water thus withdrawn was returned again into the river immediately below the lower dam. The defendants insisted upon their right so to divert and withdraw the water, by means of their canal, upon the ground, that it was a small part only, (about one fourth) of the water, to which, as mill owners on the lower dam, they were entitled; and that there was no damage whatsoever done to the plaintiff's mill by this diversion of the water.

Upon the coming in of the answer, a preliminary question was suggested by the court at the hearing, which was argued by

C. S. Daveis for the plaintiff, and by

P. Mellen and *Longfellow* for the defendants.

STORY J.—The question, which has been argued upon the suggestion of the court, is of vital importance in the cause; and, if decided in favor of the plaintiff, it supersedes many of the inquiries, to which our attention must otherwise be directed. It is on this account, that we thought it proper to be argued, separately from the general merits of the cause.

The argument for the defendants then presents two distinct questions. The first is, whether, to maintain the present suit, it is essential for the plaintiff to establish any actual damage. The second is, whether, in point of law, a mill owner, having a right to a certain portion of the water of a stream for the use of his mill at a particular dam, has a right to draw off the same portion, or any less quantity of the water, at a considerable distance above the dam, without the consent of the owners of other mills on the same dam. In connection with

these questions the point will also incidentally arise, whether it makes any difference, that such drawing off of the water above, can be shewn to be no sensible injury to the other mill owners on the lower dam.

As to the first question, I can very well understand, that no action lies in a case, where there is *damnum absque injuriâ*, that is, where there is a damage done without any wrong or violation of any right of the plaintiff. But I am not able to understand, how it can correctly be said, in a legal sense, that an action will not lie, even in case of a wrong or violation of a right, unless it is followed by some perceptible damage, which can be established, as a matter of fact; in other words, that *injuria sine damno* is not actionable.[1] On the contrary, from my earliest reading, I have considered it laid up among the very elements of common law, that, wherever there is a wrong, there is a remedy to redress it; and that every injury imports damage in the nature of it; and, if no other damage is established, the party injured is entitled to a verdict for nominal damages. *A fortiori*, this doctrine applies, where there is not only a violation of the right of the plaintiff; but the act of the defendant, if continued, may become the foundation, by lapse of time, of an adverse right in the defendant; for then it assumes the character, not merely of a violation of a right, tending to diminish its value, but it goes to the absolute destruction and extinguishment of it. Under such circumstances, unless the party injured can protect his right from such violation by an action, it is plain, that it may be lost or destroyed, without any possible remedial redress. In my judgment, the common law countenances no such inconsistency, not to call it by a stronger name. Actual, perceptible damage is not indipensable as the foundation of an action. The law tolerates no farther inquiry than, whether there has been the violation of a right. If so, the party injured is entitled to maintain his action for nominal damages, in vindication of his right, if no other damages are fit and proper to remunerate him.

So long ago as the great case of *Ashby v. White*, (2 Lord Raym. R. 938; S. C. 6 Mod. R. 45; Holt's R. 524); the objection was put forth by some of the judges, and was answered by Lord Holt, with his usual ability and clear learning; and his judgment was supported by the House of Lords, and that of his brethren overturned. By the favor of an eminent judge, Lord Holt's opinion, apparently copied from his own manuscript, has been recently printed.[2] In this last printed opinion, (p. 14,) Lord Holt says, "It is impossible to imagine any such thing, as *injuria sine damno*. Every injury imports

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[1] See *The Mayor of Lynn, &c. v. Mayor of London*, (4 T. R. 130, 141, 143, 144); Comyn's Dig. *Action on the case*, B. 1 and 2.

[2] See "The Judgments delivered by the Lord Chief Justice Holt, in the case of *Ashby v. White, et al.*, and in the case of *John Paty, et al.*, printed from the original MS." London: Saunders & Benning, 1837. It is understood, that the publication is under the direction of Lord Chief Justice Denman. See particularly p. 14. 15. 27. 30. of these opinions.

damage in the nature of it," (S. P. 2 Ld. Raym. R. 955.) And he cites many cases in support of his position. Among these is *Turner v. Sterling*, (2 Lev. R. 50; S. C. 2 Vent. R. 25); where the plaintiff was a candidate for the office of bridge-master of London bridge, and the lord mayor refused his demand of a poll; and it was determined, that the action was maintainable for the refusal of a poll. Although it might have been, that the plaintiff would not have been elected, the action was nevertheless maintainable; for a refusal was a violation of the plaintiff's right to be a candidate. So in the case cited, as from "23 Edward III. 18, tit. *Defence*." (It is a mistake in the MS., and should be 29 Edward III. 18, b. Fitz. Abridg. title, *Defence*, pl. 5); and 11 H. IV. 47, where the owner of a market, entitled to toll upon all cattle sold within the market, brought an action against the defendant, for hindering a person from going to the market with the intent to sell a horse, it was, on the like ground, held maintainable; for though the horse might not have been sold, and no toll would have become due; yet the hindering the plaintiff from the possibility of having toll, which was an injury, as did import such damage, for which the plaintiff ought to recover. So in *Hunt v. Dowman*, (Cro. Jac. 478; S. C. 2 Roll. R. 21); where the lessor brought an action against the lessee, for disturbing him from entering into the house leased, in order to view it, and to see, whether any waste was committed; and it was held, that the action will lay, though no waste was committed and no actual damage done; for the lessor had a right to enter, and the hindering of him was an injury to that right, for which he might maintain an action. So *Herring v. Finch*, (2 Lev. R. 250), where it was held, that a person entitled to vote, who was refused his vote at an election, might well maintain an action therefor, although the candidate, for whom he might have voted, might not have been chosen; and the voter could not sustain any perceptible or actual damage by such refusal of his vote. The law gives the remedy in such a case; for there is a clear violation of the right. And this doctrine, as to a violation of the right to vote, is now incontrovertibly established; and yet it would be impracticable to show any temporal or actual damage thereby.[1]

In the same case, of *Ashby v. White*, as reported by Lord Raymond, (2 Lord Raym. R. 953,) Lord Holt said, "If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy, if he is injured in the exercise or enjoyment of it; and, indeed, it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal."[2]

The principles, laid down by Lord Holt, are so strongly commended, not only by authority, but by the common sense and common

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[1] See *Harmer v. Tappenden*, (1 East R. 555); *Drew v. Carleton*, (1 East R. 563, note); *Kilham v. Ward*, (2 Mass. R. 236); *Lincoln v. Hapgood*, (11 Mass. R. 350); 2 Viner Abridg. *Action, Case*, N. c. pl. 3.

[2] S P. 6 Mod. R. 53.

justice of mankind, that they seem absolutely, in a juridical view, incontrovertible. And they have been fully recognised in many other cases. The note of Mr Sergeant Williams to *Meller v. Spateman*, (1 Saund. R. 346, *a*, note 2); *Wells v. Watling*, (2 W. Black. R. 1239); and the case of the Turnbridge Dippers, *Weller v. Baker*, (2 Wils. R. 414,) are direct to the purpose. I am aware, that some of the old cases inculcate a different doctrine, and perhaps not reconcilable with that of Lord Holt. There are also some modern cases, which at first view seem to the contrary. But they are distinguishable from that now in judgment; and, if they were not, *Ego assentior Scævolæ*. The case of *Williams v. Morland*, (2 B. & Cresw. R. 910,) seems to have proceeded upon the ground, that there was neither any damage nor any injury to the right of the plaintiff. Whether that case can be supported upon principle, it is not now necessary to say. Some of the dicta in it have been subsequently impugned; and the general reasoning of the judges seems to admit, that if any right of the plaintiff had been violated, the action would have lain. The case of *Jackson v. Pesked*, (1 M. & Slew. R. 235,) turned upon the supposed defects of the declaration, as applicable to a mere reversionary interest, it not stating any act done to the prejudice of that reversionary interest. I do not stop to inquire, whether there was not an over-nicety in the application of the technical principles of pleading to that case; although, notwithstanding the elaborate opinion of Lord Ellenborough, one might be inclined to pause upon it. The case of *Young v. Spencer*, (10 B. & Cresw. R. 145,) turned also upon the point, whether any injury was done to a reversionary interest. I confess myself better pleased with the ruling of the learned judge, (Mr Justice Bayley,) at the trial, than with the decision of the court in granting a new trial. But the court admitted, that, if there was any injury to the reversionary right, the action would lie; and although there might be no actual damage proved, yet if anything done by the tenant would destroy the evidence of title, the action was maintainable. *A fortiori*, the action must have been held maintainable, if the act done went to destroy the existing right, or to found an adverse right.

On the other hand, *Margetti v. Williams*, (1 B. & Adol. R. 415,) goes the whole length of Lord Holt's doctrine; for there the plaintiff recovered, notwithstanding no actual damage was proved at the trial; and Mr Justice Taunton on that occasion cited many authorities to show, that where a wrong is done, by which the right of the party may be injured, it is a good cause of action, although no actual damage be sustained. In *Hodson v. Todd*, (4 T. R. 71, 73,) the court decided the case upon the very distinction, which is most material to the present case, that if a commoner might not maintain an action for an injury, however small, to his right, a mere wrong-doer might, by repeated torts, in the course of time establish evidence of a right of common. The same principle was afterwards recognised by Mr Justice Grose, in *Pindar v. Wadsworth*, (2 East R. 162.) But the case of *Bower v. Hill*, (1 Bing. New Cases, 549,) fully sustains the doc-

trine, for which I contend ; and, indeed, a stronger case of its application cannot well be imagined. There the court held, that a permanent obstruction to a navigable drain of the plaintiff's, though choked up with mud for sixteen years, was actionable, although the plaintiff received no immediate damage thereby ; for, if acquiesced in for twenty years, it would become evidence of a renunciation and abandonment of the right of way. The case of *Blanchard v. Baker*, (8 Greenl. R. 253, 268,) recognises the same doctrine in the most full and satisfactory manner, and is directly in point ; for it was a case for diverting water from the plaintiff's mill. I should be sorry to have it supposed, for a moment, that *Tyler v. Wilkinson*, (4 Mason R. 397,) imported a different doctrine. On the contrary, I have always considered it as proceeding upon the same doctrine.

Upon the whole, without going farther into an examination of the authorites on this subject, my judgment is, that, whenever there is a clear violation of a right, it is not necessary in an action of this sort to show actual damage ; that every violation imports damage ; and if no other be proved, the plaintiff is entitled to a verdict for nominal damages. And, *a fortiori*, that this doctrine applies, whenever the act done is of such a nature, as that by its repetition or continuance it may become the foundation or evidence of an adverse right.[1]

But if the doctrine were otherwise, and no action were maintainable at law, without proof of actual damage ; that would furnish no ground, why a court of equity should not interfere, and protect such a right from violation and invasion ; for, in a great variety of cases, the very ground of the interposition of a court of equity is, that the injury done is irremediable at law ; and that the right can only be permanently preserved or perpetuated by the powers of a court of equity. And one of the most ordinary processes, to accomplish this end is by a writ of injunction, the nature and efficacy of which for such purpose, I need not state, as the elementary treatises fully expound them.[2] If, then, the diversion of water complained of in the present case is a violation of the right of the plaintiffs, and may permanently injure that right, and become, by lapse of time, the foundation of an adverse right in the defendant, I know of no more fit case for the interposition of a court of equity, by way of injuction, to restrain the defendants from such an injurious act. If there be a remedy for the plaintiffs at law for damages, still that remedy is inadequate to prevent and redress the mischief. If there be no such remedy at law, then, *a fortiori*, a court of equity ought to give its aid to vindicate and perpetuate the right of the plaintiffs. A court of equity will not indeed entertain a bill for an injunction in case of a mere trespass fully remediable at law. But, if it

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[1] See also *Mason v. Hill*, (3 Barn & Adolph. R. 304 ; S. C. 5 Barn. & Adolph. R. 1.)

[2] See Eden on Injunctions ; 2 Story on Equity Jurisp. ch. 23, §86, to §959 ; *Bolivar Manuf. Co. v. Neponset Manuf. Co.*, (16 Pick. R. 212.)

might occasion irreparable mischief, or permanent injury, or destroy a right, that is the appropriate case for such a bill.[1]

Let us come, then, to the only remaining question in the cause; and that is, whether any right of the plaintiff, as mill-owner on the lower dam, is or will be violated by the diversion of the water by the canal of the defendants. And, here, it does not seem to me, that, upon the present state of the law, there is any real ground for controversy, although there were formerly many vexed questions, and much contrariety of opinion. The true doctrine is laid down in *Wright v. Howard*, (1 Sim. & Stu. R. 190,) by Sir John Leach, in regard to riparian proprietors, and his opinion has since been deliberately adopted by the king's bench.[2] "*Prima facie*, (says that learned judge,) the proprietor of each bank of a stream is the proprietor of half the land covered by the stream; but there is no property in the water. Every proprietor has an equal right to use the water, which flows in the stream; and, consequently, no proprietor can have the right to use the water to the prejudice of any other proprietor, who may be affected by his operations, no proprietor can either diminish the quantity of water, which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above. Every proprietor, who claims a right, either to throw the water back above, or to diminish the quantity of water, which is to descend below, must, in order to maintain his claim, either prove an actual grant or license from the proprietors affected by his operations, or must prove an uninterrupted enjoyment of twenty years, which term of twenty years is now adopted upon a principle of general convenience, as affording conclusive presumption of a grant." The same doctrine was fully recognised and acted upon in the case of *Tyler v. Wilkinson*, (4 Mason R. 397, 400, 401, 402); and also in the case of *Blanchard v. Baker*, (8 Greenl. R. 253, 266.) In the latter case, the learned judge, (Mr Justice Weston,) who delivered the opinion of the court, used the following emphatic language: "The right to the use of a stream is incident or appurtenant to the land through which it passes. It is an ancient and well-established principle, that it cannot be lawfully diverted, unless it is returned again to its accustomed channel, before it passes the land of a proprietor below. Running water is not susceptible of an appropriation, which will justify the diversion or unreasonable detention of it. The proprietor of the water-course has a right to avail himself of its momentum as a power, which may be turned to beneficial purposes."[3] Mr Chancellor Kent has also summed up the same doctrine,

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[1] See 2 Story on Equity Jurisp. §926, §927, §928, and the cases there cited; *Jerome v. Ross*, (7 John. Ch. R. 315); *Van Bergen v. Van Bergen*, (3 John. Ch. R. 282); *Newburgh Turnpike Co. v. Miller*, (5 John. Ch. R. 101); *Gardner v. Village of Newburgh*, (2 John. Ch. R. 162.)

[2] *Mason v. Hill*, (3 Barn. & Adolph. R. 304; S. C. 5 Barn. & Adolph. R. 1.) See also *Bealey v. Shaw*, (6 East R. 208.)

[3] The case of *Mason v. Hill*, (5 Barn. & Adolph. R. 1,) contains language of an exactly similar import, used by Lord Denman, in delivering the opinion of the court. See also *Gardner v. Village of Newburgh*. (2 John. Ch. R. 162.)

with his usual accuracy, in the brief, but pregnant, text of his commentaries, (3 Kent's Comm. Lect. 42, p. 439, 3d edit.); and I scarcely know, where else it can be found reduced to so elegant and satisfactory a formulary. In the old books, the doctrine is quaintly, though clearly stated; for it is said, that a water-course begins *ex jure naturæ*, and having taken a certain course naturally, it cannot be [lawfully] diverted. *Aqua currit, et debet currere, ut currere solebat.*[1]

The same principle applies to the owners of mills on a stream. They have an undoubted right to the flow of the water, as it has been accustomed of right and naturally to flow to their respective mills. The proprietor above has no right to divert, or unreasonably to retard this natural flow to the mills below; and no proprietor below has a right to retard or turn it back upon the mills above, to the prejudice of the right of the proprietors thereof. This is clearly established by the authorities already cited; the only distinction between them being, that the right of a riparian proprietor arises by mere operation of law, as an incident to his ownership of the bank; and that of a mill-owner, as an incident to his mill. *Bealey v. Shaw*, (6 East R. 208); *Saunders v. Newman*, (1 B. & Ald. R. 258); *Mason v. Hill*, (3 B. & Adolph. R. 304; S. C. 5 B. & Adolph. 1); *Blanchard v. Baker*, (8 Greenl. R. 253, 268); and *Tyler v. Wilkinson*, (4 Mason R. 397, 400 to 405,) are fully in point. Mr Chancellor Kent, in his commentaries, relies on the same principles, and fully supports them by a large survey of the authorities. (3. Kent Comm. Lect. 52, p. 441 to 445, 3d edit.)

Now, if this be the law on this subject, upon what ground can the defendants insist upon a diversion of the natural stream from the plaintiff's mills, as it has been of right accustomed to flow thereto? First, it is said, that there is no perceptible damage done to the plaintiffs. That suggestion has been already in part answered. If it were true, it could not authorize a diversion, because it impairs the right of the plaintiffs to the full, natural flow of the stream; and may become the foundation of an adverse right in the defendants. In such a case, actual damage is not necessary to be established in proof. The law presumes it. The act imports damage to the right, if damage be necessary. Such a case is wholly distinguishable from a mere fugitive, temporary trespass, by diverting or withdrawing the water a short period, without damage, and without any pretence of right. In such a case the wrong, if there be no sensible damage and it be transient in its nature and character, as it does not touch the right, may possibly (for I give no opinion upon such a case,) be without redress at law; and certainly it would found no ground for the interposition of a court of equity by way of injunction.

But I confess myself wholly unable to comprehend, how it can be assumed in a case, like the present, that there is not and cannot be an actual damage to the right of the plaintiffs. What is that right? It is

[1] *Shurry v. Pigott*, (3 Bulst. R. 339; S. C. Popham R. 166.)

the right of having the water flow in its natural current at all times of the year to the plaintiff's mills. Now, the value of the mill privileges must essentially depend, not merely upon the velocity of the stream, but upon the head of water, which is permanently maintained. The necessary result of lowering the head of water permanently, would seem, therefore, to be a direct diminution of the value of the privileges. And if so, to that extent it must be an actual damage.

Again: It is said, that the defendants are mill-owners on the lower dam, and are entitled, as such, to their proportion of the water of the stream in its natural flow. Certainly they are. But where are they so entitled to take and use it? At the lower dam; for there is the place, where their right attaches, and not at any place higher up the stream. Suppose, they are entitled to use, for their own mills on the lower dam, half the water, which descends to it, what ground is there to say, that they have a right to draw off that half at the head of the mill-pond? Suppose, the head of water at the lower dam in ordinary times is two feet high, is it not obvious, that by withdrawing at the head of the pond one half of the water, the water at the dam must be proportionally lowered? It makes no difference, that the defendants insist upon drawing off only one fourth of what, they insist, they are entitled to; for, *pro tanto*, it will operate in the same manner; and if they have a right to draw off to the extent of one fourth of their privilege, they have an equal right to draw off to the full extent of it. The privilege, attached to the mills of the plaintiff, is not the privilege of using half, or any other proportion merely, of the water in the stream, but of having the whole stream, undiminished in its natural flow, come to the lower dam with its full power, and there to use his full share of the water power. The plaintaiff has a title, not to a half or other proportion of the water in the pond, but is, if one may so say, entitled *per my et per tout* to his proportion of the whole bulk of the stream, undivided, and indivisible, except at the lower dam. This doctrine, in my judgment, irresistibly follows from the general principles already stated; and what alone would be decisive, it has the express sanction of the supreme court of Maine, in the case of *Blanchard v. Baker*, (8 Greenl. R. 253, 270.) The court there said, in reply to the suggestion, that the owners of the eastern shore had a right to half the water, and a right to divert it to that extent; "It has been seen, that if they had been owners of both sides, they had no right to divert the water without again returning it to its original channel, [before it passed the lands of another proprietor.] Besides, it is impossible, in the nature of things, that they could take it from their side only. An equal portion from the plaintiff's side must have been mingled with all, that was diverted."

A suggestion has also been made, that the defendants have fully indemnified the plaintiff from any injury, and in truth have conferred a benefit on him, by securing the water by means of a raised dam, higher up the stream, at Sebago Pond, in a reservoir, so as to be capable of affording a full supply in the stream in the dryest seasons. To this

suggestion several answers may be given. In the first place, the plaintiff is no party to the contract for raising the new dam, and has no interest therein; and cannot, as a matter of right, insist upon its being kept up, or upon any advantage to be derived therefrom. In the next place, the plaintiff is not compellable to exchange one right for another; or to part with a present interest in favor of the defendants at the mere election of the latter. Even a supposed benefit cannot be forced upon him against his will; and, certainly, there is no pretence to say, that, in point of law, the defendants have any right to substitute, for a present existing right of the plaintiff's, any other, which they may deem to be an equivalent. The private property of one man cannot be taken by another, simply because he can substitute an equivalent benefit.

Having made these remarks, upon the points raised in the argument, the subject, at least so far as it is at present open for the consideration of the court, appears to me to be exhausted. Whether, consistently with this opinion, it is practicable for the defendants successfully to establish any substantial defence to the bill, it is for the defendants, and not for the court, to consider.

I am authorized to say, that the district judge concurs in this opinion.

Decree accordingly.

Circuit Court of the United States, Massachusetts, October Term, 1840, at Boston.

ALDEN AND OTHERS v. DEWEY AND ANOTHER.

In an action for an infringement of a patent right, evidence that the invention of the defendant is better than that of the plaintiff is improper, except to show a substantial difference between the two inventions.

Where the defendant offered evidence to show, that the invention was not original with the plaintiff; the court instructed the jury, that the question was, whether any one communicated to the plaintiff *substantially* the improvement for which he took out letters patent, so that, *without more inventive power*, he could have applied it.

In considering the question of the originality of an invention, the oath of the inventor, made prior to the issue of the letters patent, that he was the true and first inventor of the improvement, may be opposed to the oath of a witness in the case, whose testimony is offered to show, that the invention was not original.

THIS was an action for an infringement of a patent right for an improvement in scythe snathes. The original patentee was Dexter Peirce, who took out letters patent, March 11th, 1837. He afterwards assigned his right and interest under these letters to several persons, who again assigned to the plaintiffs in the present case. The special improvement, which formed the subject matter of the present suit, was described in the claim as follows: "What I claim as my

own invention, and not previously known, and desire to secure by letters patent, is my constructing the nib or thole irons and woods, so as by the extention of the iron beyond the wood, with a screw and nut to regulate and fasten the nibs or tholes in any situation desirable on the snead."

Before the patent of Peirce, the nibs of scythes had been clumsily fastened to the snathe by means of an iron ring, tightened by wedges. These wedges were easily loosened in the use of the scythe. The defendants manufactured and sold a large number of nibs, which were secured to the snathe by a ring at the end of an iron stem. This stem passed through the wood of the nib, was threaded at the top, and fitted into a nut, which was adjusted in the end of the wood. The wood moved in a brass cellar which was at the bottom, and being turned by the hand, operated as a wrench upon the nut, and was pressed upon the scythe snathe ; and in this way the nib was secured and regulated in any situation desirable on the snead. The nib used by the defendants, is usually known as Clapp's method or improvement. It was contended by the plaintiff's counsel that this was substantially the same, with the improvement of the plaintiffs. Several witnesses were examined, as experts, who testified that the two differed in certain particulars, and details, but that they were the same in principle.

For the defence it was urged, that the plaintiffs could not have an exclusive right to the use of the screw for purposes of fastening ; but it was answered that the claim was not for this element, but simply for a combination into which that entered ; and this view was sustained by the court. It was also urged, that the two nibs were unlike ; and that the nib of the defendants was not an infringement of the right of the plaintiffs. No witnesses were called to this point by the defendants. Evidence was given to show that the nib of the defendants was better than that of the plaintiffs ; and that it found a readier market. But the court instructed the jury to disregard this consideration, except so far as it went to show a substantial difference between the two nibs. It was no matter, if the defendants' was more polished, or even worked better than the plaintiffs, provided it embodied the principle of the plaintiffs. It did not follow, because the defendants improved the machine of the plaintiffs, that, therefore, they could use it.

Another defence was set up, which received particular attention from the court. Daniel Draper testified, that, in conversation with Dexter Peirce, the patentee, sometime at the end of the winter, or beginning of the spring of 1835, he remarked that he found great difficulty in suiting his customers, in respect to the nibs of scythe snathes ; and that he thought they might be improved by the application of the nut and screw to the nib or thole. He did not suggest any mode of doing this. He never reduced his idea to practice. The witness said that Peirce treated the idea as impracticable, and laughed at it. It appeared on cross-examination that the witness had been, for the first part of his life a tanner, and then went into the patent

wood ware business, in which he continued till January 1, 1835, when he formed a copartnership with another for the manufacture of hammers and scythe snathes, but that he did not continue to make snathes more than six months. The witness knew that Peirce took out a patent in March, 1837, for his improvement in the scythe snathe, and that he had assigned the same for a valuable consideration ; but he never spoke to him on the subject, or reminded him of the suggestion he had made, though he was in the habit of seeing him from time to time.

Fletcher and *Charles Sumner* for the plaintiffs.

B. Rand and *B. R. Curtis* for the defendants.

Story J. on these facts, submitted to the jury this question : Did Draper communicate to Peirce substantially the improvement for which he took out his patent, so that, without more inventive power, Peirce could have applied it ? It was not enough that Draper gave a hint ; nor, on the other hand, was it necessary that he should communicate every minute thing about the invention ; but he must have communicated the substance. The court further instructed the jury, that the original patentee had sworn that he was the true and first inventor of the improvement, for which he had taken out letters patent ; that this oath was required by law, prior to the issue of the letters patent ; so that, supposing the jury should be of opinion that the asserted communication of Draper covered the substance of Peirce's invention, then there would be oath against oath. If they should be of opinion that Draper simply gave a hint, which Peirce afterwards reduced to practice, then the two oaths would not conflict. If Peirce swore falsely that he was the first and true inventor, then he was liable to indictment for perjury. The testimony of Draper with regard to Peirce was in the nature of confessions, and this was always regarded as an uncertain kind of evidence. The conversation was in private, and nobody could contradict the witness. The judge stated that this was the first time, within his long experience on the bench, that such a conversation had been set up as a ground of destroying the title of a patentee to his invention.

The court further instructed the jury, that it was not necessary that the two nibs should be identical, in order to make one an infringement of the other. The true questions was, are the means used the same substantally, though not in every little particular ? With regard to damages, the jury were told not to give extravagant or vindictive damages ; but such as would establish the right of the plaintiffs, and indemnify them against all the expenses of litigating their right. If the defendants were sued a second time for violating the right of the plaintiffs, then it would be proper to give vindictive damages. The jury thereupon found a verdict for the plaintiffs, for $1167 66.

At a subsequent day of the term (Dec. 21,) the case came on again, on a motion for a new trial, for that the learned judge ruled, in the course of the trial, that one Peirce, who was offered as a witness, was interested, and could not be examined as a witness, but the learn-

ed judge further ruled, that an affidavit made by the said Peirce before he took out his patent and in order to obtain the same, was evidence in the cause, although it appeared that the said Peirce was interested at the time he made the said affidavit. And the said learned judge instructed the jury that they were to take into consideration the said oath of Peirce, and that only one witness having sworn that he communicated to Peirce the substance of the invention, and Peirce having sworn by his said affidavit that he believed himself to be the original inventor, the jury had oath against oath, and that the jury must decide, whether the solemn oath of Peirce had been thus overcome by the testimony of one witness. It was also moved that the damages assessed by the jury were excessive.

B. R. Curtis urged, in support of the first ground of the motion, that the ruling of the court was inconsistent with the general principles of the law of evidence; that it conflicted with the rule, requiring an opportunity to cross-examine a witness; also, with the other rule, excluding the testimony of an interested witness. In support of his views, he cited English cases in actions on the case for a malicious suit. He also relied upon the proceedings of courts under the registry laws, and bankrupt laws. He further urged that the statute, reqiring the oath of the patentee, was intended to secure the public against fraud; but, that, if the construction of the court was to prevail, it would operate as a security to the patentee, and would be, not a shield to the public, but a sword against it. The learned counsel also argued, in support of the second ground of the motion for a new trial, that the damages were excessive.

STORY J. without hearing the other side, ruled, as at the trial, that the patent was *prima facie* evidence in the case; that the patent recited the oath; and that the jury had cognizance of it; in short, that the oath was in the case, and the jury were entitled to judge of its force. This was the foundation of the *onus probandi* that was thrown upon the defendants in a patent cause. The courts of the United States had constantly acted upon this view. With regard to the question of damages, the court confessed that the damages, awarded by the jury, were greater than were anticipated; but still there did not seem to be any such gross mistake in the jury, as would authorize setting aside their verdict. It was a matter submitted to their fair judgment.

Judgment according to the verdict.

BACON v. BANCROFT.

The tariff being a statute regulating commerce, the terms of it must be construed according to commercial usage and understanding. In this case, it was submitted to the jury, to determine, whether *gunny cloth* and *cotton bagging* were different articles of commerce.

THIS was an action against the defendant, as collector of the port of Boston, to recover back the amount of duties paid under protest upon

a quantity of gunny cloth, imported by the plaintiff, and by the collector charged with the duty on cotton bagging. It was agreed, that gunny cloth was imported and used extensively for the purpose of covering cotton in bales, and as a substitute for the article commonly known as cotton bagging. And it was submitted to the jury, under the instruction of the court, to find, whether the article in question was that known in commerce as cotton bagging, or another and different article. It appeared by the testimony, that cotton bagging and gunny cloth were both well known in this country before the passing of the tariff, and that they were considered as different articles of commerce, and known by different names.

Dexter for the plaintiff.

Mills, district attorney, for the defendant.

STORY, J. instructed the jury that the tariff being a statute regulating commerce, the terms of it must be construed according to commercial usage and understanding; and that if they found, of which there appeared no doubt, the evidence being uniform to that effect, that the two articles were understood and known among merchants to be different articles of commerce, and that the article in question had not been known in commerce as cotton bagging, it was not subject to the duty, whatever might be the use to which it had been applied.

The jury immediately returned a verdict for the plaintiff.

District Court of the United States, Massachusetts, December Term, 1840, at Boston.

CHATFIELD v. BARQUE WOLGA AND OWNERS.

The court refused to sanction a custom, not supported by strong proof, of having a watch on board vessels in foreign ports at the expense of the sailors.

Where process *in rem* is commenced without notice to the owners, who reside within the district, no more costs will be allowed than in the case of a monition to show cause.

THIS was a libel in admiralty against the barque Wolga. The libellant was a seaman on board the vessel, on a voyage from New York to Antwerp and back to Boston, and claimed to recover the sum of fortysix dollars and thirty cents as wages. Thomas Richardson made answer in behalf of the barque and owners, in which it was admitted that the libellant had a just claim for nearly the whole sum demanded, deducting two dollars paid in Antwerp by the master for a watch on board the vessel; in regard to which, the answer set forth that it was customary and lawful for all masters of vessels that arrive in said port of Antwerp, to hire people from the shore to watch the

ship, at night, instead of compelling the seamen to keep such watch; and to charge a proportionate part of the expense of said watch to each of the seamen on board such ship, and to deduct the same from their wages; and that the same was a reasonable and general custom, and well known to both merchants and mariners; and that the master of said barque Wolga did, while in the port of Antwerp, hire such a watch during the night, and paid therefor a reasonable price, and that the said libellant well knew that such watch was hired, and never objected to the same, nor offered to keep watch himself, nor did in fact keep such watch; and that the just share and proportion of the expense of said watch, chargeable to the libellant, was the said sum of two dollars.

Evidence was introduced in support of the alleged custom, and several masters of vessels testified to the existence of the custom, and that they had conformed to it, sometimes with the previous consent of the seamen, sometimes without; but had uniformly deducted the amount paid for a watch from the wages of the men, without objection on their part. Some captains, however, did not hire any watch.

Charles H. Parker for the libellant.

Dexter for the respondent.

Davis J. said, that in order to establish such a custom as the one contended for, it was necessary that the proof should be strict, and the custom uniform. The evidence in this case had satisfied neither of the requisitions. It appeared that the custom was sometimes observed, and sometimes departed from—the express assent of the crew sometimes obtained, and sometimes not. In this case, no express assent was set up, and the custom, not being uniform, could not bind the crew without such express assent. He further observed that the custom of permitting the men to be absent on shore, at night, was exceptionable and of immoral tendency, and if it were to be admitted at all, should be admitted only upon very strict proof. Wherefore he decreed that the libellant should recover his whole claim, with costs.

At a subsequent day the counsel for the respondent submitted to the court, that as the owners of the vessel lived in Boston, and process *in rem* issued without any previous notice to them by monition to show cause, whether any costs ought to be allowed; and thereupon the court ordered that costs should be taxed for the respondent as if the hearing had been upon a monition to show cause, and that the additional expenses of the arrest be paid by the libellant.

Court for the Correction of Errors, New York, January, 1841, at Albany.

SMITH AND HOE v. ACKER.

[The following condensed statement of an important case, involving the construction of a New York statute, relative to chattel mortgages, has been furnished for the public prints by Mr Wendell, the state reporter.]

SMITH and Hoe brought an action of replevin in the New York common pleas against Acker, then sheriff of the city and county of New York, for taking an imperial printing press, alleged to be the property of the plaintiffs, from a printing office occupied by Jared W. Bell. The press was taken by the deputy of the defendant on the 30th of January, 1838, by virtue of an execution against Bell. The press in question, together with other presses, printing materials and household furniture, was mortgaged by Bell to Smith and Hoe, on the 26th of March, 1837, to secure the payment of $10,000. The mortgage was filed in the county clerk's office on the second day after the date. The time specified for the payment of the money was the first day of May, 1837 : and until default in payment, it was stipulated that Bell should remain in possession of the property, and in the full and free enjoyment of it. At the date of the mortgage, Bell was bona fide indebted to the plaintiffs in the sum of $10,000, for presses and printing materials supplied him by the plaintiffs. The property in the printing office was assessed by a third person—and valued at the sum mentioned in the mortgage, and he testified that had it been sold at public auction under the mortgage at any time between March, 1837, and January, 1838, it would not have brought over twenty per cent. of its value. In the summer and autumn of 1837, Bell was in ill health, and a good part of the time confined to his bed, during which time the plaintiffs assisted him to carry on his business. A bookkeeper of the plaintiffs testified that there was no reduction of the debt owing by Bell to the plaintiffs for the period of a year after the date of the mortgage; and that the plaintiffs did not sell out Bell, because they knew that by so doing they would have to sustain a heavy loss, and thought that by sustaining him until the times were better, they would obtain their money, and his other creditors would stand a chance to be paid. The deputy sheriff, at the time of the levy, was told that Bell did not own the property—that it was mortgaged. The property at the time of the levy, was in the possession of Bell. The defendant's counsel moved for a non-suit. The presiding judge decided that the mortgage being unaccompanied by possession—and no reason sufficient in the law being shown for not taking possession, it was fraudulent, and that the plaintiffs were not entitled to recover. The counsel for the plaintiffs insisted that the question of fraudulent intent should be submitted as a question of fact to the jury ; which the judge did not do, but on the contrary, ordered a non-suit, and judgment was accordingly entered which was subsequently affirmed by the supreme court. The plain-

tiffs thereupon sued out a writ of error removing the record into the court for the correction of errors, where the judgments of the New York common pleas and of the supreme court were reversed and a *venire de novo* awarded. The vote for reversal was 21—for affirmance 4.

Marine Court, New York, January, 1841.

From the New York Journal of Commerce.

Matthews v. Harrison and another.

Where the third story of a house was let for a specified term, and the premises having been destroyed by fire, the house was rebuilt, and the premises were tendered to the defendant, who refused to take them; in an action for the rent, it seems to have been left to the jury to decide, whether "the old law was too severe," and whether the burning was an ejection of the tenants.

This was an action to recover the rent of premises which had been burned down. The plaintiff let to the defendants the third story of a house in Catharine street, for a specified term, and the premises were burned down in the latter part of April last, being before the time for which the premises were let for had expired. Immediately after the premises were burned down, the plaintiff took possession of them and commenced rebuilding them, which he effected in about ninety days. In the interim, and before the rebuilding was completed, application was made to him on the part of the defendants, to know what he intended to do with them, and he replied that it would be time enough for him to tell that when they were finished. As soon as the premises were finished the plaintiff tendered possession of them to the defendants who refused to take it, and the plaintiff brought this action to recover the rent which had accrued, from the time the premises were burned, to last November. The defence set up was that the fire and subsequent possession of the premises by the plaintiff was an ejection of the tenant, and he was no longer liable for the rent. The amount of rent claimed was about $100.

Randall J. charged the jury. It was formerly held that although premises were burned down, the tenant was still liable for the rent. But the counsel for the defendants had cited several cases in which this exposition of the law was overruled, and amongst others he cited a decision of the vice chancellor, who decided that in cases where premises were burned down, the rent which accrued afterwards could not be recovered. This was the equity of the case, and being equity ought also to be the law. But the jury in the present case had both equitable and legal powers, being judges of both the law and the fact. The court would therefore leave the case entirely to their decision. The sole question for them to pass upon was whether the burning

down of the house was an ejection of the tenant. And when considering that, they must not forget that the defendants only rented a part of it, and that, the third story. If the jury concluded that the burning of the premises was an ejection of the tenant, they should find for the defendants. But if they thought that the old law was not too severe, and applied to this case, then they might find for the plaintiff.

The jury retired for a few minutes and brought in a verdict for the defendants.

DIGEST OF AMERICAN CASES.

Selections from 18 Pickering's (Mass.) Reports.

ACTION ON THE CASE.

In the absence of all rights acquired by grant or adverse user for twenty years, the owner of land may dig a well on any part thereof, notwithstanding he thereby diminishes the water in his neighbour's well, unless in so doing he is actuated by a mere malicious intent to deprive his neighbor of water. — *Greenleaf v. Francis*, 117.

ASSIGNMENT.

1. Where an assignment was made by an insolvent debtor to a creditor, in trust for the benefit of the assignee and such other creditors as should execute the same within a certain time, and the assignee accepted the trust, and a portion of the creditors became parties to the assignment, it was *held*, that those creditors who had executed the assignment, were not authorized to annul it and attach the property, before the expiration of such time, without the consent of the other creditors, although the debtor had withheld the evidences of debts due to him, and had refused to deliver to the assignee, and fraudulently wasted, a part of the property assigned; that the assignee was bound to allow all the creditors to become parties to the indenture, within the time limited; that a creditor whom the assignee had, within such time, refused to permit to execute the assignment, might enforce the execution of the trust or recover an equitable compensation; and that the assignee was bound to account, not only for the property which he had received, but for such as might have been recovered by him from the debtor by the use of due diligence.— *Pingree v. Comstock*, 46.

2. An assignment by an insolvent debtor of "all his lands, tenements and hereditaments," was *held* sufficient to pass all his real estate without a more particular description.— *Ibid.*

3. The *lay* or share in the profits of the voyage, which a seamen in a whaling ship receives, according to a custom, in lieu of wages, is assignable before the commencement of such voyage.—*Gardner v. Hoeg, and Trs.* 168.

4. Where a seamen, in a whaling ship, by his deed purporting to be for the consideration of $800, assigned his *lay* before the commencement of the voyage, but the assignee paid him no money at the time, but agreed to advance money for his use before and during the voyage, and made advances accordingly, and upon the assignor's return rendered him an account thereof, in which he was credited with the sum of $800 for his lay, with which account he was satisfied,

it was *held*, that such assignment was valid as against the plaintiff, a creditor of such seamen at the time of the assignment, although no notice of the assignment had been given to the owners of the vessel, until after the termination of the voyage, and just before such lay was attached in their hands by the plaintiff.—*Ibid.*

5. Where an insolvent debtor in Connecticut assigned all his property, including certain lands in Massachusetts, in trust for the benefit of his creditors, *pro ratâ*, under the provisions of a statute of that state, none of the creditors being parties to the assignment, and at the same time conveyed such land to the trustee by a deed which referred to the assignment as to the purposes of the conveyance, and which was duly executed and recorded according to the laws of Massachusetts, it was *held*, that the statutory assignment in Connecticut was void in regard to land in Massachusetts, the title to real estate being exclusively subject to the laws of the state where it lies; and that the second deed, being ancillary to the statutory assignment, was without consideration and void as against creditors in Massachusetts, who attached the land after such deed had been recorded.—*Osborn v. Adams*, 245.

BILL OF EXCHANGE AND PROMISORY NOTE.

1. Where a note is payable on demand at a specified bank, no demand need be made at any other place, and in an action against an indorser, it will be presumed, in the absence of evidence to the contrary, that the note was at the bank, and that some officer of the bank was in attendance to receive payment.—*Folger v. Chase*, 63.

2. Where a note indorsed by the payee to a bank of which P. H. F. was the cashier, was again indorsed as follows: "P. H. F., Cashier," it was *held*, that such second indorsement was sufficient. And *it seems*, that in an action upon such note, by the second indorsees against the payee, if the second endorsement is not sufficiently certain, the plaintiffs may, at the trial, prefix the name of the bank to such indorsment.—*Ibid.*

3. An indorsement written on a slip of paper, which was attached to the back of a note by a wafer, for the purpose of writing receipts of partial payments thereon, there not being room on the back of the note, was *held* to be sufficient; the indorsement having been made after several of such receipts had been written on such attached paper.—*Ib.*

4. Where a joint and several promissory note was executed and left in the hands of M., one of the promisers, to be delivered to the payee, when it should be demanded by him, in exchange for a note for the same amount, but of a previous date, and signed by M. alone, and no demand was made therefor by the payee before the death of M., it was *held*, that the new note did not operate *de facto* as a payment of the old note, that the property in such new note had not vested in the payee, and that he could not recover the possession of it from the administrator of M., it being presumed, that the interest which had accrued upon the old note was to be paid upon making the exchange.—*Canfield v. Ives*, 253.

5. In the case of a note indorsed after it has become due, the indorser is not liable unless payment be demanded of the maker, and notice of the non-payment given to the indorser; and as such a note has become payable on demand, the demand on the maker must be made within a reasonable time, and immediate notice of non-payment given to the indorser.—*Colt v. Barnard*, 260.

6. A promissory note given for compounding a public prosecution for a misdemeanor, is founded upon an illegal consideration.—*Jones v. Rice*, 440.

CONSTITUTIONAL LAW.

1. A corporation is not authorized to appropriate private property to public uses, without the consent of the owner, unless it appear, either by the express words of the act of incorporation, or by necessary implication therefrom, that the legislature intended to confer such authority upon the corporation.—*Thacher v. Dartmouth Bridge Co.*, 501.

2. An act incorporating certain persons for the construction of a bridge, and conferring upon them authority to take the land necessary for such purpose, without the consent of the owner, and making no provision for his indemnification, is, in this respect, in contravention of the constitution of the commonwealth, and is so far void.—*Ib.*

DEED.

1. In a deed of a parcel of land in which were a well and pump, an interlineation of the words "with pump and well of water," after the description of the land by metes and bounds, was *held* to be an immaterial alteration, as the effect of the deed would be the same without those words.—*Brown v. Pinkham*, 172.

2. In an action of trespass by a mortgagee of personal property against an officer who attached the property at the suit of a creditor of the mortgager, it was *held*, that the certificate of the town clerk on the mortgage, that it had been duly recorded in his office, could not be disproved, as against the mortgagee, by the production of a copy of the supposed record differing materially from the mortgage itself.—*Ames v. Phelps*, 314.

DEPOSITION.

1. A deposition taken under a commission, directed in the common form, to any justice of the peace, &c., is admissible in evidence, although it does not appear, that the person before whom the deposition was taken was a justice of the peace, otherwise than by his signature upon the deposition.—*Adams v. Graves*, 355.

2. It seems that where a commission to take depositions, is directed to a person by name, it is immaterial whether he has any official character or not, as he would have sufficient authority to take the depositions, from the commission itself.—*Ib.*

EVIDENCE.

1. Evidence that the indorser of a note was frequently at a certain bank transacting business there, and that, he frequently paid notes there, was *held* sufficient proof of his being conversant with the usage of the bank to give notice to promisors to pay at the bank, instead of sending the notes to them and demanding payment.—*Shove v. Wiley*, 558.

2. A book kept by a bank, in which a clerk regularly entered certificates of his having given notices to the makers and indorsers of promissory notes, taken in connexion with his testimony that it was his practice to carry the notices personally to the house or place of business of the parties, and that he has no doubt they were carried as usual, in the case of a certain note mentioned in the book, though he has no recollection in relation to such note, is competent and sufficient evidence to prove that notices were so given in a particular case.—*Ib.*

FRAUDS, STATUTE OF.

The provision in the statute of frauds, that no action shall be maintained on any agreement that is not to be performed within one year from the making thereof, unless the same be in writing, does not extend to an agreement that one party may cut certain trees on the land of the other at any time within ten years, for such an agreement may be performed within one year.—*Kent v. Kent*, 569.

FRAUDULENT CONVEYANCE.

A mortgage of real estate was made to secure the payment of a ne-

gotiable promissory note, and the mortgagee, not being in possession, assigned the mortgage, during the pendency of an action against him for slander, in order to avoid more effectually the judgment which might be recovered against him, and subsequently died insolvent, and his administrator assigned the same mortgage to a *bona fide* purchaser, for a valuable consideration. It was *held*, that the prior assignment was fraudulent, and that it was void, under *St.* 27 *Eliz.* c. 4, as against such subsequent purchaser. —*Clapp v. Leatherbee*, 131.

GUARDIAN.

In general, if a guardian neglects to put his ward's money at interest, he will be charged with interest; and in cases of gross delinquency, with compound interest.—*Boynton v. Dyer*, 1.

INSURANCE.

1. Two days before the expiration of a policy, fully insuring a vessel on time, the defendants made a policy insuring the same vessel, at and from Boston, to Charleston, the second policy providing, that if the assured should have made prior insurance upon the vessel, then the defendants should be chargeable only for so much as the amount of such prior insurance should be deficient towards fully covering the property at risk, whether for the whole voyage, or from one port of loading or discharge to another. The vessel sailed from Boston before the expiration of the first policy, but was lost after it had expired. It was *held*, that the second policy attached, notwithstanding the first policy continued in full force till after the vessel had sailed from Boston, and that the defendants were consequently liable for the loss.—*Kent v. Manufacturer's Insurance Co.*, 19.

2. By a policy of insurance on a vessel, the defendants "caused C. & L., for the owners, payable to C. & L., to be insured." It was *held*, that an action might be maintained on such policy in the names of such owners, with the consent of C. & L., it not appearing that the defendants had any claim against C. & L.—*Farrow v. Commonwealth Ins. Co.*, 53.

3. A vessel insured at Boston struck on Carysford reef, while on a voyage to Mobile, and was injured to the amount of more than half her value, but was got off and arrived in safety at Mobile. While she was lying at a wharf in that port, a survey was held upon her, and the surveyors having recommended a sale, she was sold by the master, who was also a part owner and one of the insured, without consulting the insurers or the agent of the owners at Boston. It was *held*, that the master, as such, was not justified, under these circumstances, in selling the vessel.—*Peirce v. Ocean Ins. Co.*, 83.

4. In the same case it appeared, that when the facts became known in Boston, the agent before mentioned, to whom, by the policy, the loss was made payable, called on the insurers with the protest and the other usual documents to prove a loss, and a statement setting forth a claim for a salvage loss on the vessel incurred in consequence of her getting on the reef on her voyage to Mobile, at which place she was surveyed, condemned and sold for the good of all concerned, the insurers being charged therein with the value of the vessel and credited with the proceeds of the sale, and demanded payment of a total loss; and that an action was subsequently brought by such agent against the insurers, claiming as for a total loss, the declaration averring the interest to be in the master and other part owners *jointly*. It was *held*, that under such declaration no distinction could be made between the rights of the other part owners and those of the master, who could not set up his own unauthorized act as the foundation for a claim for a total loss, and who was also incapacitated from making an

effectual abandonment, by the sale, which passed his interest in the vessel as a part owner; that (*semble*) the other part owners, by joining in the claim against the defendants, in which they set forth the sale and credit the insurers with the proceeds, ratified the sale, and so disqualified themselves to abandon; that there was not in fact an abandonment, there being no relinquishment of the vessel or of any interest therein; that if it could be considered that an abandonment was made by implication, it was made on the ground that the vessel had been condemned and sold, which did not warrant the owners in abandoning, and they could not avail themselves of the ground that the vessel was injured, by striking on the reef, to the amount of more than half her value; and, consequently, that there was not such an abandonment, as would relate back to the time when the loss occurred, so as to constitute the master the agent of the insurers, thereby throwing on them the responsibility for such unauthorized sale, and thus render them liable as for a total loss—*Ib.*

5. In the case of a double insurance, by two insurers, the party insured may elect to consider each insurer as liable to bear a proportionate share of a loss, and recover accordingly; or to require either of them to pay the whole; in which latter case, the one who pays the whole or a disproportionate part of the loss, would have a remedy against the other for a contribution.—*Wiggin v. Suffolk Ins. Co.*, 145.

6. Where in such case the party insured commenced an action on both policies at the same time, and one of the insurers paid into court one half of the actual loss, (first making certain deductions by way of set-off,) and the insured took the money out of court, it was *held*, that this was *prima facie* evidence, that he made his election to consider each insurer responsible for one half of the sum actually at risk.--*Ib.*

7. A vessel was insured by the defendants, by a policy providing that any "loss shall be paid in sixty days after proof and adjustment thereof, the amount of the premium note, if unpaid, and all sums due to the insurers from the insured, when the loss becomes due, being first deducted; and all sums coming due being first paid or secured to the satisfaction of the insurers, they discounting interest for anticipating payment." At the same time the insured gave the defendants a bottomry bond on the vessel, with sureties. Subsequently a policy on another vessel was underwritten by the defendants for the same person, containing the like provision respecting sums due and coming due to the insurers, and a provision prohibiting the insured from assigning the policy without insurers' previous consent. This second policy was assigned to the plaintiff, with their consent, they "reserving to themselves all the rights expressed in the policy regarding premium notes, debts, &c." The first policy was not assigned. In an action by the assignee of the second policy for a loss, it was *held*, that the insurers must deduct from a loss on the first policy, all premium notes due from the insured, whether given before or after the assignment of the second policy, and must deduct the balance of such loss from the sum due on the bottomry bond; and that they had a right to set off the balance remaining due on the bond after such deduction, against the plaintiff's claim, without first resorting to the vessel bottomried or to the sureties on the bond.—*Ib.*

8. Where an underwriter assented to an assignment of the policy, "reserving his rights expressed in the policy," and by the terms of the policy any loss was to "be paid in sixty days after proof and adjustment thereof, the amount of the premium note, if unpaid, and all sums due to the underwriter from the insured when such loss becomes due, being first deduct-

ed," it was *held*, in an action by the assignee to recover a loss, that the underwriter was entitled to deduct the amount of premium notes given by the assignor for policies underwritten subsequently in the ordinary course of business, and without any fraudulent intent to defeat the assignment.—*Wiggin v. American Ins. Co.*, 158.

9. In the same action it was *held*, that the underwriter, having a claim against the assured on the bottomry bond, had a right to deduct the amount of his claim from the loss on the policy, and was not obliged to resort to the surety on the bond, though solvent, in relief of the assignee of the policy.—*Ib.*

OBITUARY NOTICES.

In Dracut, Mass. January 9, Benjamin F. Varnum, Esq. Sheriff of Middlesex, aged 45.

In Newark, N. J. Jan. 17, Seth Lee, Esq. counsellor at law, of Barre, Mass. aged 70.

In Huron County, Ohio, December 16, Hon. Jabez Wright, aged 61. He accidently fell down a bank into a stream and was drowned. He was one of the first settlers of that county.

In Washington, N. H. Jan. 2, David Heald, Esq. aged 82. He was educated at Dartmouth College and was graduated in 1792. He read law with Judge Hinckley, of Northampton, Mass.; and was a member of the bar in the counties of Cheshire and Sullivan, N. H. for more than forty years.

In Chicago, Illinois, January 13, where he was confined by sickness since Dec. 2, Caleb Alexander Buckingham, Esq. in the 27th year of his age, counsellor at law, of Geneva, Kane co. Illinois, and fourth son of Joseph T. Buckingham, Esq. editor of the Boston Courier.

In Providence, R. I., Samuel W. Bridgman, Esq. mayor of that city. General Bridgman was elected mayor, upon the organization of the city government, and has been annually re-elected without any serious opposition. He was one of the oldest members of the bar of the state, and throughout his long life maintained a character for integrity and probity, which secured to him the confidence of all who knew him. As a man and as a magistrate, he filled a place which it will be difficult to supply. The court of common pleas adjourned on the day of his death, as a testimony of respect for his memory, and meetings of the bar and the school committee were held, at which appropriate resolutions were passed.

At Pegwell Cottage, Kent, Eng. Sir William Garrow. He was a native of Monkton Hadley, in the county of Middlesex, where he was born on the 13th of April, 1760. He was the second son of the late Rev. David Garrow, who resided in the above village for many years, and who died on the 20th of March, 1805, in the 90th year of his age. At an early age of his life he was placed under a Mr Southouse, a special pleader of the Temple, in which society being admitted a

student, he was called to the bar in 1780. He served the several offices of solicitor and attorney-general to his majesty George IV., when Prince of Wales, and represented the boroughs of Callington and Eye in several successive parliaments. On the appointment of the late Sir Vicary Gibbs to the bench of the common pleas, he was promoted to the office of attorney-general, as also to the chief justiceship of Chester. In 1817 he was nominated to a barony in the exchequer. In 1831 he retired from the judicial bench, since which period he continued to live in perfect retirement at his marine villa, Pegwell Cottage, in the county of Kent, until his death. The late Sir William has been a widower for more than 30 years, and has left but one daughter, the present Mrs Eliza Lettsom, who in 1804 married Mr F. F. Lettsom, eldest son of the late Dr Lettsom, of Camberwell; his (Sir William's) only son, the late Rev. Dr David William Garrow, dying in April, 1827.

In Washington, Jan. 12, Stephen Haight, Esq., sergeant-at-arms of the senate of the United States. Mr Haight was a native of Vermont. He was reared upon a farm, and enjoyed but very limited means of early intellectual culture. But, overcoming the obstacles of a defective education by the energy of superior intellect, he rose to important civil stations in the state—having been, for many years, a member of its legislature, and successively a judge and sheriff of the county in which he resided. In the legislature he was distinguished for readiness and skill in debate; and, on the bench, by quickness of apprehension, justness of discrimination, and sound common sense. He possessed uncommon sagacity; was a careful and judicious observer of passing events, and an excellent judge of men. His official duties were discharged with promptness and energy—qualities which distinguished him, even under the pressure of the complicated diseases which terminated his life. Under an exterior seldom marked, during the later years of his life, by strong emotion, he possessed feelings of great susceptibility, alive to the wants and sufferings, and ever ready to minister to the relief of his fellow men. He has left a wife and daughter in Vermont to mourn the loss of a kind husband and an affectionate father. In the earlier stages of his last sickness, he forbore to send for his wife, under a belief that he should recover so as to be able to reach Vermont, as well as from a regard to the delicacy of her health, which would have been much endangered by a journey, in midwinter, to that city. After appropriate religious services, the remains of the deceased were followed by the Vermont delegation in both houses of congress, and other friends of the bereaved family, to the public cemetery in Washington, from whence they are to be removed to Vermont, under an appropriation made by the senate for that purpose.

In Nashville, Tenn. Hon. Felix Grundy. He was a native of Berkley county, Virginia, and was born on the 11th of September, 1775. In 1780, his father removed his family to Kentucky, where his son was educated under the tuition of Dr James Priestly. He pursued his legal studies under the direction of George Nicholas, then the most celebrated counsellor in the west; was admitted to the Kentucky bar about 1797; a delegate from Washington county to the state convention for revising the constitution of Kentucky in 1799; soon after elected a member of the general assembly of that state, and so continued by successive re-elections—some of them unanimous—until Nov., 1806, at which time he was appointed judge of the court of appeals, and subsequently chief justice of the state. In the year 1808, he resigned his office as chief justice of the state of Kentucky, and removed to Tennessee, intending to devote himself exclusively to his profession; he came to Nashville, where he has ever since resided. His practice soon became lucrative and extensive, and in 1811 he was elected to congress from that district with great unanimity. Mr Grundy left congress in the year 1814, and for fifteen years his extensive practice at law and the nurture and education of his children formed his principal and favorite employment, with the exception of temporary official trusts, and occasional service as a member of the legislature of Tennessee. In 1829 he was elected to the United States senate

to fill out the unexpired term of his predecessor. He was re-elected for six years in 1833, and continued a member of that body until 1837, when he was appointed by President Van Buren attorney general of the United States. In 1839 he was again chosen a senator of the United States, and continued in that responsible station till the time of his death. He was eminent as a lawyer; he was an able debater and long maintained a high position as a member of the democratic party. In private life, he was beloved by his neighbors and friends, and was regarded as a man of strict integrity. He was an active member of the Presbyterian church. He was a self made man—and has acted a prominent part in the political history of this country for many years. He has left a handsome patrimony to his highly respectable family.

In Portland, Me. on Thursday, December 30th, Hon. PRENTISS MELLEN, aged 76. He was the son of the Rev. John Mellen, of Sterling, Massachusetts, at which place he was born October 11, 1764. His father was graduated at Harvard College in 1741, and was a learned clergyman of great simplicity of manners and purity of life. He died at Reading, Mass. in 1807, aged 85. His elder brothers, Rev. John, of Cambridge, and Henry of Dover, were graduates of Harvard, and with his sisters and one other brother, a family of nine, have all preceded him to the tomb. The subject of our notice, the last of his honored stock, was graduated at Harvard in 1784; of his class consisting of 44 but 12 remain. After leaving college, he spent one year in the family of Joseph Otis, Esq. of Barnstable, as a private tutor, and then commenced the study of law with the eccentric but talented lawyer, Shearjashub Bourne, Esq. of that place. He was admitted to the bar, at Taunton, in Oct. 1788 and commenced practice in his native town. But the business there not affording him sufficient encouragement, in eight months, he removed to South Bridgewater in the county of Plymouth, where he continued until November, 1791. It was while he resided at Bridgewater that he formed the acquaintance of Miss Hudson, of Hartford, Conn. who was then visiting at that place, which was consummated by marriage in May, 1795.

In November 1791, he made a visit to his brother Henry, who was seven years his senior, and who had established himself at Dover, N. H. in the practice of law. Here he remained, assisting him during the winter and spring; and the following summer at the request and by the advice of his firm and steadfast friend the late judge Thatcher, he removed to Biddeford, opened his office in a room of the tavern and made a rude beginning of that career of usefulness and honor, which was attended with brilliant results and placed him at the head of the bar in Maine. In 1806, he moved to Portland which was the principal seat of law as well as of commercial business, and in the courts of which, his engagements had already become numerous and important. From 1804 until his appointment as chief justice of Maine, in 1820, he practised with eminent success, in the courts of every county in the state and was retained in every cause of magnitude. During this period he came in contact with the most gifted minds of the country, among whom were the late Chief Justice Parker, Justice Wilde, now of the supreme court of Massachusetts, Daniel Davis, Chase, Symmes, Whitman, Lee, Orr, Longfellow, Emery and Hopkins, whose powers were disciplined by constant practice in the school of legal conflict, under the able and accomplished legal administrations of Dana, Parsons, Sedgwick, Sewall, Parker and Jackson, and at a period when the law was ripening its fruits to the rich maturity of the present day. It was no easy task and no common effort to contend with such minds; and it required accurate research, patient thought and constant vigilance, to sustain the contest in such noble competition.

At the bar, Mr Mellen was ardent, at times impetuous, frequently impatient under restraint, but always courteous and kind, always pursuing with unflagging zeal the interest of his client and always ready for every adverse or prosperous incident which might transpire in the progress of the cause. He lost no opportunity to avail himself of every omission or weak position of his adversary, and he assailed it with irresistible force and rapidity, while he attacked his stronger

points with all the weapons of argument and wit. He was a ready and accurate lawyer, an able and at times a very eloquent advocate. He was a man of warm imagination and a fine literary taste, which early inclined him to cultivate a familiarity with the muses, and like some other distinguished judges of our day, he made poetry the sport of his idle hours from his earliest to his latest age. If one faculty of his mind gained ascendancy over the others, we should say that by a constitutional temperament, the imaginative preponderated over the reflective powers.

On the bench, Judge Mellen was careful and thorough in the examination of all points presented to his consideration. His great anxiety was to determine every case according to the law and the evidence, and to do *full* and impartial justice to the parties. He was impatient at the delay and procrastination in the management of suits which has been an increasing evil for some years past, and was ever eager to press forward the business of the court to a conclusion. If ever a judge was actuated by pure and conscientious motives in the high seats of the law, it was Chief Justice Mellen; in these attributes he was not surpassed even by the immaculate Hale. He always regarded as something more than a formal declaration, the provision of the constitution, that "right and justice shall be administered freely and without sale, completely and without denial, promptly and without delay." He may be said to have grown up with the law in Maine, for until about the time he came into it, the law was but little known as a science there, and not a volume of American reports, and scarcely a native elementary treatise on the subject had been published. The practitioners of that day had to grope along by such lights as they could obtain from abroad and such as flowed from the fundamental principles of truth and justice.

Mr Mellen received the degree of LL. D. from Harvard and Bowdoin, in 1820; he was a member of the council of Massachusetts in the years 1808, 1809 and 1817: in 1816 he was elector at large for president, and in 1817 he was chosen a senator in congress from Massachusetts. And at the time of the separation of Maine in 1820, he resigned his seat in the senate, and on the organization of the new state, he was selected as chief justice of the supreme court.—This high office he continued to occupy with distinguished ability until October 11, 1834, when at the age of 70 he became legally disqualified by the terms of the constitution from a longer tenure. The manner in which he discharged the duties of that elevated station is partly disclosed in the first eleven volumes of the Maine reports, which will forever remain a monument of his legal discrimination, great familiarity with practice and high sense of justice.

But above all his other qualifications, and as a crowning attribute of his character, Judge Mellen was a man of sterling integrity and firm religious principle. His whole life was clear and transparent; for it was regulated by motives drawn from a pure and permanent source, and directed by general benevolence and by a high sense of moral obligation. The calmness and patience with which he bore his last sickness and resigned his spirit to its divine author, bore testimony to the rectitude of his heart, the sincerity of his faith and the firmness of his principles. His wife died Sept. 10, 1838, aged 71 years. It is a singular fact that his brother John died at the same age as his own in 1828, and his mother of the same disorder in 1802, aged 75. His son Grenville, well known for his contributions to American literature, who is now on a voyage to Cuba for his health, and three daughters, survive to mourn the loss of a most tender and affectionate parent.

As soon as the death of the late chief justice was announced on Thursday morning, Dec. 31st, a meeting of the bar was called, at which, Samuel Fessenden, Esq. the president of the bar, being absent from sickness, the Hon. Stephen Longfellow was called to preside, and Wm. Goodenow, Esq. appointed Secretary. Joseph Adams, Esq. having stated the melancholy occasion of their assembling, moved that a committee be raised to consider and report the proceedings proper for the bar to adopt to testify their respect for their departed brother and friend, who was the senior member of the bar. The motion was briefly spoken to by Mr Deblois and Mr Daveis, who both testified their regard for the deceased, and their sympathy for the loss the community and the bar had sustained; after which

a committee of three were appointed, consisting of Jos. Adams, C. S. Daveis, and Wm. Willis, Esqrs. The committee retired soon after and reported some resolutions, which were unanimously adopted. In the absence of the president of the bar, Mr Chief Justice Whitman, of the common pleas, was requested to offer the resolutions to the supreme judicial court, then in session, with such remarks as he might deem suited to the occasion. Accordingly in the afternoon, immediately on the assembling of the court he spoke as follows:

"By a resolution of the bar of this county, it has been made my painful duty to announce to the court, that it has pleased the great disposer of all things, at one o'clock this morning, to terminate the earthly existence of the Honorable Prentiss Mellen; and to communicate to the court now here in session, certain resolutions adopted by the bar on the occasion; which I now beg leave to present. The deceased was our brother; and has been taken from us at an age to which but few can hope to arrive. The bereavement is nevertheless sudden; and until within a few days, unexpected. He seemed to possess a vigor of body and strength of mind, which led us to cherish hopes, that his society and usefulness might still for many years be prolonged.

"I have known him in the profession of the law for half a century; and, since entering the profession myself, have known him intimately. And whether in conflict, or in co-operation with him at the bar, his energies and virtues equally commanded my admiration: And I may truly say of him, that during the greater portion of his career, no individual in the state has filled a wider space in the public eye. For vigor of intellect, untiring industry and persevering fidelity, he was unrivalled. Nevertheless, in all his conflicts with his brethren he was singularly fortunate in never being, by his ardor, so far transported as to be left, even unintentionally, to inflict the slightest wound upon their feelings. He was ever courteous and gentlemanly. In all the relations of life he was governed by the strictest sense of duty and propriety. As a friend and companion his unaffected good nature, his vivacity and wit were the delight of all who knew him. It may justly be said of him that he was 'in wit a man, in simplicity a child.'

"As a public character I knew him equally well. The offices conferred upon him were of the highest responsibility; and were ever sustained with honor. As a member of the senate of the United States he was eminently conspicuous for his discrimination, and devotion to the best interests of his country; and was peculiarly fortunate in acquiring the sincerest esteem of the good and great men with whom he was associated.

"Twice was he selected, with others, to digest and revise the statutes of the state —a task to the successful accomplishment of which but few can be considered as possessing the requisite combination of talents and acquirements. He brought to the task a real love of labor, in connection with the highest order of legal attainments. How well he succeeded is known to the legal profession, and to the public.

"As to his labors, as chief justice of the state, I shall be silent, believing they will not fail to be duly appreciated by a grateful country, and well knowing that your honor, so long associated with him on the bench, must be vastly more competent than any one else to portray his merits. The loss of such a man at any time is a public calamity; and to his associates in his profession; to his friends and relations, and to his family this bereavement is truly afflicting."

To which Chief Justice Weston replied as follows:—"Having been for many years associated with the late chief justice of this court, I feel as if bereaved of an elder brother, who to the claims of official comity, had added the endearments of personal friendship. No one sympathises more sincerely with his afflicted family. I knew his worth, and how well entitled he was to be beloved. He has departed this life, full of days and of honors. Up to the period of his last sickness, he had been in the continued enjoyment of health, and in the possession of his mental faculties, very little, if at all, impaired. He was thus mercifully preserved from the infirmities of body and the imbecility of mind, which so often attend extreme old age.

"After having been a member of the bar for thirty years, developing and displaying talents of the first order as an advocate, he was appointed to preside in this court. And when the period of judicial superannuation had arrived, we saw him

again, with fresh and almost youthful ardor, as a practitioner at the bar; and some of the happiest exhibitions of his forensic talent were made upon the last law circuit. The manner in which he discharged his official duties, will be long remembered and appreciated by the profession, of which he was the pride and ornament, in every part of the state.

"Happily for the community, his legal attainments and high character as a jurist, are partially embodied in our judicial reports. His industry in the discharge of his multiplied duties, public and private, was unremitted. He was eminently cheerful and social; and added to the sterling qualities of his head and heart, the graces of urbanity and great polish of manners.—But the crown of all his merits was, that he was truly an honest man; *an Israelite indeed, in whom there was no guile.* He has gone. We cannot better cherish his memory, than by endeavoring to imitate his virtues.—Most happy should I have been, if in succeeding to his seat, I had found it enveloped with his mantle; but while I follow in the path, which he has made luminous, *haud passibus æquis,* I can only hope, that I may preserve the ermine of office equally unsullied."

The court then adjourned. The bar raised a committee of arrangements for the funeral, consisting of Joseph Adams, Charles S. Daveis, William Willis, Thomas A. Deblois, and Augustine Haines. The funeral was attended by all the judges of the supreme court, the judges of the district, probate and municipal courts and by the members of the bar, who embraced that opportunity to pay the last sad token of respect to the memory of a beloved friend, associate and brother.

W.

INTELLIGENCE AND MISCELLANY.

Judicial History of Massachusetts.—We have been much pleased with a recent work, entitled "Sketches of the Judicial History of Massachusetts from 1630 to the Revolution of 1775. By Emory Washburn." A thorough investigation of the early judicial history of Massachusetts, and of the names and characters of those who have been connected with the administration of justice there, must have been attended with numerous difficulties. It was necessary to seek for light not only in the general and local histories which have been published, and the compilations of biographical notices, but also in the records of courts and the state archives, and from reminisciences to be sought from individuals. The difficulties, inseparable from such an undertaking, can only be appreciated by those who know the labor of such researches; and would have discouraged one of a less ardent temperament, and habitual industry, than Mr Washburn. The fathers of this commonwealth had nothing like a judicial system. They retained the names of tribunals; but as ministers were law makers, and attorneys and judges were selected from all classes of society, the technical forms of law were held in low estimation. There were but two real attorneys in the colony. One was exiled, and the other "debarred from pleading any man's cause, unless his own, and admonished not to presume to meddle beyond what he shall be called by the court." The work before us clearly exhibits how necessarily the absence of fixed precedents is supplied by that discretionary action and construction, which is the worst sort of despotism. It also shows, that the notions of liberty entertained by the puritans, were, like their notions of toleration, somewhat narrow and selfish; and it is also strikingly evident, that the progress of just notions of civil liberty and true equality kept pace with the progress from gospel to law, and from the irregularity of judicial proceedings to a strict regard for judicial forms. The history of the colony, as of the mother country in every age, shows that the necessary attendant of civil liberty has been an incorruptible and learned judiciary, supported by a virtuous, firm, and intelligent profession. The author of this work deserves well of the country. He is well known, in Massachusetts, as an

eminent member of the Worcester bar, who devotes himself with untiring zeal to the duties of his profession, and who can have little leisure to employ himself in pursuits of a purely literary character. The present work is highly creditable to him in every respect, and will prove to be of great interest, not merely to his own profession; it will afford pleasure to all who take any interest in the early history of our country, as presenting most interesting reminisciences of the government and character of a community of individuals, the most remarkable of modern times.

KENT'S COMMENTARIES.—The fourth edition of the commentaries of Mr Chancellor Kent has just been published and is received on sale by Messrs Little & Brown, in Boston. It contains so much new and valuable matter, as to render it almost indispensible to professional gentlemen in order to ascertain, with certainty and the least labor, the exact position of the law in relation to every point of interest. The industry and research of the learned author is untiring; and his constant desire seems to be to render his commentaries a complete exposition of American law. He accordingly keeps up a systematic, thorough, and accurate history of the law, as it is expounded by the courts, and he also brings to the aid of his investigations all the information to be obtained from new works upon science, politics, and history. The present edition of his commentaries is altogether more valuable than former editions, inasmuch as it contains references to, and comments upon, all the principal decisions which have been made since the last edition was published. We notice with pleasure, that, in the examinations of the learned author, our magazine has not been overlooked; but all the leading cases, which have appeared in this work from the commencement, have been carefully examined and referred to. The mechanical execution of the present edition is superior to the others, and, indeed, is inferior to no American law treatise that we have ever seen.

INSPECTORS OF PRISONS IN BOSTON.—The judges of Probate, of the municipal court, and the justices of the police court, are required by law to visit the prisons in the county of Suffolk twice every year. We received the report of their last inspection, made to the mayor and aldermen of the city, too late for a detailed notice this month; but we cannot forbear adding our testimony to the faithfulness and energy with which they seem to have performed their duty, and the independence with which they have expressed their views. Nothing appears to have escaped their notice; and although they speak in terms of praise of most of the institutions they inspected, they have not hesitated to stamp with their disapprobation every thing which did not meet their ideas of propriety and duty. However much those may complain of the judge of the Boston municipal court, who differ from him in his notions of the administration of criminal law, we have never known any one to deny, that he is one of the best writers in the community. This report is characterized by his usual neat and happy manner of expression, with a smooth and flowing style, and well rounded periods, that would do infinite credit to a host of professed literary writers who send their crude productions into the world, evincing little real labor, and less knowledge of the ornaments of elegant composition.

ATTORNEYS AND COUNSELLORS.—The following counsellors were admitted as such during the January term of the supreme court of New York:—Thomas G. Alvord, Elnathan R. Atwater, Samuel Belding, Jr., Charles H. Bramhall, Wells Brooks, Bradley B. Burt, Cornelius H. Bryson, William Clark, Jr., Edwin A. Doolittle, Edwin Dodge, Harlowe Emerson, Alfred C. Farlin, James Genter, James Gibson, Amos K. Hadley, Amaziah B. James, Thomas D. James, William McMurry, Isaac M. Newcomb, Amos C. Osborn, George W. Rathbun, Denison Robinson Seymour St. John, John Thompson, T. Richard Van Ingen, Peter G. Webster, William D. White, Lester Wilcox, Alexander F. Wheeler.

The following attorneys were admitted as such at the same term of the court:—William P. Angel, Robert Angus, Alexander H. Baley, Lewis Benedict, Jr., Edward S. Brayton, B. Franklin Chapman, Clark B. Cochran, William H. Eagle, Perry G. Elsworth, William H. Gibbs, Alexander G. Johnson, William W. Mann, Nathaniel B. Milliman, Samuel I. Mills, William T. Odell, Abraham B. Olin, George W. Parker, Louis J. A. Papineau, Charles W. Rogers, James R. Rose, William A. Sternberg, J. Fairfield Wells, George N. Williams.

Sumner's Reports.—The third volume of these reports embraces the cases argued and determined in the circuit court of the United States for the first circuit from the October term, 1837, in Maine, to the October term 1839, in Massachusetts. The decisions of Mr Justice Story are eagerly sought for throughout this country, and nothing we can say will add to the high estimation in which they are held. Mr Sumner is favorably known as a learned and accurate reporter by the two previous volumes of his reports. In this connection, we take pleasure in transferring to our pages the following passage which occurs in an article on American orators and statesman, in the last number of the London Quarterly Review. "Mr Justice Story's charges to juries are much admired: and his judgments are admirable specimens of judicial statement and reasoning. The most important are reported by Mr Charles Sumner, barrister, who recently paid a visit of some duration to this country, and presents in his own person a decisive proof that an American gentleman, without official rank or wide-spread reputation, by mere dint of courtesy, candor, an entire absence of pretension, an appreciating spirit, and a cultivated mind, may be received on a perfect footing of equality in the best English circles, social, political, and intellectual; which, be it observed, are hopelessly inaccessible to the itinerant note-taker, who never gets beyond the outskirts of the show-houses."

Popular Law Lectures.—The Law Institute, in the city of New York, has advertised a course of lectures on the "Elements of Judicial Science," to be delivered by Henry W. Warner, Esq. The Commercial Advertiser says that Mr Warner has long stood high at the bar, especially as a chancery lawyer; and is liberally endowed with those attainments and those attributes of mind which will render him both an entertaining and an instructive teacher. These lectures, as we understand, are not designed particularly for members of the legal profession, or for the students of that profession. There have been several courses of law lectures delivered of late years in New York, under the auspices of the mercantile library association; but we believe there has been no other course upon the plan proposed by Mr Warner.

TO READERS AND CORRESPONDENTS.

The review of the d'Hauteville case in our last number, and a notice of the same case in the American Jurist of January, were commented upon at length in a letter of Mr Sears, the father of Mrs d'Hauteville, to the editor of the Boston Daily Advertiser, which was answered by the editor of this magazine in the same print. This letter may be the occasion of further remarks on this subject in a future number.

We have at length received from Mr Justice Story his opinion in the celebrated case of *Otis Daniel v. William C. Mitchell and others*, decided at the May term of the circuit court of the United States, at Portland. It will appear next month.

The case of *Webb v. Portland Manufacturing Company*, in the present number, was in type before the third volume of Sumner's Reports was published, but was necessarily omitted last month.

MONTHLY LIST OF INSOLVENTS.

Insolvents.	*Occupation.*	*Place of Business.*	*Warrant issued.*
Bacon, William,	Blacksmith,	Holliston,	January 7.
Bellows, Jonas, Jr.,	Shoemaker,	Brookfield,	January 19.
Benjamin, Charles,		Danvers,	January 14.
Besse, Constant,		Wareham,	December 23.
Blake, Asa,	Yeoman,	Wrentham,	December 16.
Blake, Ebenezer,	Esquire,	Wrentham,	December 16.
Bliss, Joel K.,		Springfield,	January 1.
Boardman, William W.,	Shoe manufacturer,	Saugus,	January 15.
Bragg, Alfred,	Shoe & leather dealer,	Boston,	January 25.
Brown, Benjamin, [*Brown & Lord.*	Merchant tailor,	Charlestown,	January 22.
Burnham, Jesse,	Boat builder.	Gloucester,	December 26.
Chandler, Jeremiah, } Chandler, Moses, }	Housewrights,	Lowell,	January 25.
Cheney, Isaac,			January 11.
Cloustan, Robert H.,	Housewright,	Boston,	January 4.
Colburn, Jonas W.,	Trader,	Lowell,	January 6.
Drew, Daniel,	Carpenter,	Andover,	January 27.
Downell, George M.,	Trader,	Boston,	January 23.
Downes, Sydney,	Card manufacturer,	Leicester,	January 25.
Field, Albert R.,	Manufacturer,	Springfield,	January 14.
Frost, Curtis,		South Hadley,	January 15.
Giles, Ezekiel,	Cordwainer,	Lowell,	January 26.
Gammons, Matthias E.,		New Bedford,	January 4.
Goss, Allen H.,	Shoemaker,	Bradford,	January 23.
Gott, Levi S.,	Trader,	Rockport,	December 30.
Goodhue, Stephen B.,	Blacksmith,	Gloucester,	December 14.
Groves, Thomas W. I.,		Springfield,	January 22.
Hale, Perley, } Hale, Bernice S. } [*P. & B. S. Hale.*	Gentlemen,	Lowell,	December 30.
Hubbard, William,	Gentleman,	Amherst,	January 25.
Jones, Abijah,	Gentleman,	Templeton,	January 18.
Keith, Mary Ann,	Widow,	Boston,	January 21.
Kilburn, John,	Yeoman,	Winchendon,	January 15.
Laws, William,	Trader,	Boston,	January 22.
Leathers, George R.,	Machinist,	Lowell,	January 9.
Lord, John, [*Brown & Lord.*	Merchant tailor,	Charlestown,	January 22.
Moore, Timothy P.,	Laborer,	Worcester,	January 14.
Page, David S.,	Housewright,	Lowell,	January 15.
Pearce, William, 3d, } Pearce, Nathaniel S. }	Traders,	Gloucester,	January 22.
Paine, Rowland, G.	Trader,	Marshfield,	January 27.
Phillips, La Roche,	Waiter,	Boston,	January 20.
Pomroy, Thomas M.	Clerk,	Boston,	January 25.
Putnam, Franklin,	Trader,	Chelmsford,	January 2.
Putney, Franklin,	Trader,	Chelmsford,	January 2.
Rix, James A.,	Trader,	Marblehead,	January 6
Rowe, Charles, } Rowe, Francis, }	Trader,	Rockport,	December 26.
Sadler, Joseph D.,	Chaise painter,	Salem,	January 26.
Sawyer, John, Jr.,	Cordwainer,	Hopkinton,	January 12.
Sibley, Pearley	Blacksmith,	Athol,	January 13.
Stafford, Nathan,		Munroe,	January 18.
Stocking, John W.,	Livery stable keeper,	Lowell,	December 11.
Stratton, Nahum,	Yeoman,	Bolton,	January 18.
Symmes, John A.,	Wheelwright,	Medford,	January 26.
Walker, Lovett,	Cordwainer,	Hopkinton,	January 6.
Weld, George M.,	Merchant,	Boston,	January 6.
Williams, David,	Currier,	Boston,	January 25.